

FILED

JUN 5 - 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

RICHARD H. WEARE, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SFUND RECORDS CTR
101860

UNITED STATES OF AMERICA,

Plaintiff,

v.

TUCSON AIRPORT AUTHORITY;
CITY OF TUCSON;
HUGHES AIRCRAFT CO.;
MCDONNELL-DOUGLAS CORP.,

Defendants.

NO. CIV 90-587 TUC-RMB

O R D E R

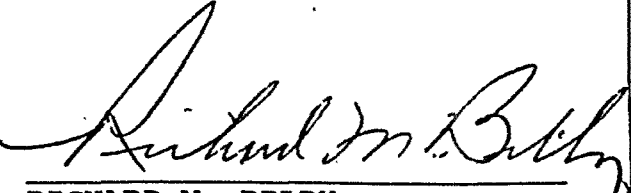
Plaintiff, the United States, has moved this Court for an Order entering the Consent Decree lodged with this Court on September 27, 1990. After considering the Comments filed in this action, and the responses of the United States to these Comments, the Court finds that entry of the proposed Decree is fair, reasonable and in the public interest.

The Court also notes that the original complaint in this action names as Defendants those entities that the government believes should be held liable under CERCLA for performing remedial actions. The complaint filed in this action does not seek to impose liability upon anyone except for the entities named as Defendants. Similarly, the Decree imposes no obligations on

anyone other than the named Defendants to perform remedial actions
at the site. Moreover, the filing of the complaint does not act
as any sort of a lien on any of the properties that lie within the
area defined as the site.

Therefore, IT IS ORDERED that the proposed Consent
Decree in this action is ENTERED as an order of this Court.

DATED this 4th day of June 1991.


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United States District Judge

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IN THE UNITED STATES DISTRICT COURT

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Plaintiff,

v.

TUCSON AIRPORT AUTHORITY,
CITY OF TUCSON,
HUGHES AIRCRAFT COMPANY,
MCDONNELL DOUGLAS CORPORATION,

Defendants.

CIV NO. _____

CONSENT DECREE

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1
2
3
4 CONSENT DECREE
5

6 WHEREAS, the United States of America ("United States"), on
7 behalf of the Administrator of the United States Environmental
8 Protection Agency ("EPA"), filed on _____, 1990, a com-
9 plaint in this matter pursuant to the Comprehensive Environmental
10 Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et
11 seq., as amended by the Superfund Amendments and Reauthorization
12 Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) ("CERCLA")
13 to: (1) compel the Settling Parties to perform certain remedial
14 actions in response to alleged releases and threatened releases
15 of hazardous substances from the Tucson International Airport
16 Area Site; (2) recover certain response costs which have been in-
17 curred by the EPA, United States Department of Interior, United
18 States Department of Justice and the United States Department of
19 Health and Human Services in response to alleged releases and
20 threatened releases of hazardous substances from a facility known
21 as the Tucson International Airport Area Site; and (3) recover
22 certain costs that will be incurred by EPA and the United States
23 Department of Justice at the Tucson International Airport Area
24 Site.

25 WHEREAS, the Complaint alleges that the Tucson International
26 Airport Area Superfund Site is a facility as defined in Section
27 101(9) of CERCLA, 42 U.S.C. §9601(9).

1 WHEREAS, the Complaint alleges that as a result of the dis-
2 posal of organic solvents, including but not limited to
3 trichloroethylene, groundwater at the Site (as defined
4 hereinafter) has been contaminated and that such contamination
5 presents or may present an imminent and substantial endangerment
6 to public health or welfare or the environment, and that a
7 response as described below in this Decree to the alleged release
8 and threatened release of such organic solvents into the environ-
9 ment is necessary in order to protect the public health and wel-
10 fare and the environment.

11 WHEREAS, on or about January 24, 1989, EPA issued Order No.
12 89-03 to some of the Settling Parties (as defined hereinafter)
13 pursuant to Section 106 of CERCLA, 42 U.S.C. §9606, which, among
14 other things, directs them to implement certain groundwater
15 remedial actions at the Site.

16 WHEREAS, the Parties agree that the actions undertaken in
17 accordance with this Consent Decree (hereinafter "Decree" or
18 "Consent Decree"), do not constitute an admission of liability by
19 any of the Settling Parties.

20 WHEREAS, pursuant to Section 122 of CERCLA, 42 U.S.C. §9622,
21 the Settling Parties have agreed to the making and entry of this
22 Consent Decree prior to the taking of any testimony, based upon
23 the pleadings herein without any admission of liability or fault
24 as to any allegation or matter arising out of the pleadings or
25 otherwise for the purpose of resolving all issues raised by the
26 Complaint and EPA Order No. 89-03.

27

1 WHEREAS, the Settling Parties do not admit, and retain the
2 right to controvert in any contemporaneous or subsequent proceed-
3 ings (other than proceedings to implement or enforce this Consent
4 Decree), the validity of the findings of fact or determinations
5 contained in this Consent Decree.

6 WHEREAS, the Settling Parties intend to fully retain and do
7 not waive any defenses or admit any liability of themselves,
8 their employees, agents and contractors, in any past, present or
9 future action in the nature of an administrative, tort, or con-
10 tractual claim arising from any act, error, or omission in, at,
11 or about the Site.

12 WHEREAS, the Parties agree that resolution of this matter
13 and entry of this Consent Decree is made in good faith in an ef-
14 fort to avoid further expensive and protracted litigation, and is
15 in the public interest.

16 WHEREAS, each undersigned representative of the Parties to
17 the Consent Decree certifies that he or she is fully authorized
18 to enter into the terms and conditions of this Decree and to ex-
19 ecute and legally bind such Party to this Decree.

20 NOW THEREFORE, it is ORDERED, ADJUDGED, AND DECREED as
21 follows:

22

23

I. DEFINITIONS

24 A. "Area B" shall mean the portion of the Tucson International
25 Airport Area Superfund Site that is depicted as Area B on Figures
26 5 and 6 of Appendix A and as is generally described in the text
27 of Appendix A.

1 B. "CERCLA" shall mean the Comprehensive Environmental Response,
2 Compensation, and Liability Act of 1980, 42 U.S.C. §9601 et seq.,
3 as amended by the Superfund Amendments and Reauthorization Act of
4 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

5

6 C. "Contractor" shall mean any individual, entity, company or
7 companies retained by or on behalf of the Settling Parties to un-
8 dertake and complete any portion of the Remedial Action. Each
9 contractor and subcontractor shall be qualified to do those por-
10 tions of the Remedial Action for which it is retained.

11

12 D. "Covered Matters" shall mean the Remedial Action, Oversight
13 Costs associated with the performance of the Remedial Action and
14 all Response Costs, including interest accrued thereon.

15

16 E. "Los Reales Road" shall mean the road in southwest Tucson,
17 Arizona that is called Los Reales Road, and the straight line be-
18 tween the two portions of Los Reales Road which are separated by
19 the Tucson International Airport.

20

21 F. "Maximum Contaminant Level" or "MCL" shall mean the maximum
22 contaminant level as that term is defined in the Safe Drinking
23 Water Act, PHSA 42 U.S.C. §§300(f) -300(j), and the specific
24 numerical values that have been promulgated as final, primary
25 maximum contaminant levels pursuant to the Safe Drinking Water
26 Act as of the effective date of this Consent Decree.

27

1 G. "Oversight Costs" shall mean all costs relating to the im-
2 plementation of the Remedial Action incurred by the EPA on and
3 after October 1, 1988, in a manner not inconsistent with the Na-
4 tional Contingency Plan. Oversight Costs include all costs in-
5 curred by EPA and the Department of Justice in negotiating this
6 Consent Decree on and after October 1, 1988.

7
8 H. "Parties" or "Party" shall mean the United States on behalf
9 of the United States Environmental Protection Agency, and the
10 Settling Parties.

11
12 I. "Record of Decision" or "ROD" shall mean the "Record of Deci-
13 sion for Groundwater Remediation North of Los Reales Road,"
14 signed by the U.S. EPA Region IX Regional Administrator on August
15 22, 1988, incorporated as Appendix A herein.

16
17 J. "Remedial Action" shall mean the design, construction, and
18 operation and maintenance (O & M) of the groundwater extraction
19 and treatment system as generally described in the ROD, and all
20 other tasks to be performed at the Site by the Settling Parties
21 as required by this Consent Decree.

22
23 K. "Response Costs" shall mean the costs incurred by the U.S.
24 EPA, the U.S. Department of Interior, the U.S. Department of Jus-
25 tice and the U.S. Department of Health and Human Services prior
26 to October 1, 1988, in response to alleged releases or threatened
27 releases of hazardous substances from the Tucson International

1 Airport Area Superfund Site. Response Costs include all costs
2 incurred by EPA and the Department of Justice prior to October 1,
3 1988, in negotiating this Consent Decree.

4

5 L. "Settling Parties" shall mean the United States on behalf of
6 the United States Air Force, Hughes Aircraft Company (Hughes),
7 McDonnell Douglas Corporation (MDC), the City of Tucson (City),
8 and the Tucson Airport Authority (TAA).

9

10 M. "Site" or "Area A" shall mean the Tucson International Air-
11 port Area Superfund Site, excluding the area south of Los Reales
12 Road, and excluding Area B.

13

14 N. "Start-up Period" shall mean the one calendar year, or a
15 shorter period of time at the Settling Parties' discretion, im-
16 mediately subsequent to the completion of construction of the
17 groundwater extraction and treatment system. The Start-up Period
18 shall commence on the Start-up Date certified by the Settling
19 Parties.

20

21 O. "Tucson International Airport Area Superfund Site" shall mean
22 the Tucson International Airport Area as it is described in the
23 National Priorities List Docket and as further specified by the
24 approximate boundaries stated in Appendix A.

25

26

27

1 P. "United States Air Force" or "USAF" shall mean the United
2 States Air Force and its component commands and units, including
3 the National Guard Bureau and all operations and activities of
4 the Arizona Air National Guard in the performance of its federal
5 mission. The Parties stipulate, and this Court finds that, for
6 purposes of this Consent Decree only, all activities pertaining
7 to the use and disposal of any materials or hazardous substances
8 by the Arizona Air National Guard at the property commonly known
9 as the "Tucson Air National Guard Base" or on what is now the
10 Tucson International Airport were done in the performance of the
11 Arizona Air National Guard's federal mission, insofar as those
12 activities may have resulted in the deposit of hazardous sub-
13 stances causing the groundwater at the Site to become con-
14 taminated. This stipulation and finding of federal mission for
15 the purposes of this Consent Decree relates, however, only to
16 Area A and does not address activities relating to Area B.

17 18 II. JURISDICTION

19 A. The Court has jurisdiction over the subject matter of
20 this action and the Parties to this Consent Decree pursuant to
21 CERCLA, 42 U.S.C. §9601 et seq., and 28 U.S.C. §§ 1331, 1345.
22 The Settling Parties shall not challenge the Court's jurisdiction
23 to enter and enforce this Consent Decree.

1 B. In the event any determination or decision of the Court
2 is required in connection with any dispute resolution or any
3 other proceeding provided for under this Consent Decree, the
4 Court shall make its determination or decision without a jury and
5 the following shall apply:

6 1. All Parties to this action shall be served with the
7 petition initiating such proceeding and with all notices, plead-
8 ings and orders filed or entered in connection therewith;

9 2. The Federal Rules of Civil Procedure and all rules
10 of the United States District Court for the District of Arizona
11 shall govern;

12 3. Each Party shall have the right to appear, intro-
13 duce evidence and argue at any hearing or hearings held; and

14 4. The Parties reserve the right to appeal any deter-
15 mination or decision of this Court.

16
17 III. BINDING EFFECT

18 A. This Consent Decree shall apply to and be binding
19 upon the United States (including EPA and USAF), the Settling
20 Parties and their successors, and assigns. The Settling Parties
21 shall provide a copy of this Consent Decree, as entered, and all
22 relevant additions to the Consent Decree, to each person, or en-
23 tity, including all contractors and subcontractors, retained to
24 perform the Remedial Action required by this Decree, and shall
25 require contractual performance to be consistent with this Con-
26 sent Decree. Notwithstanding their compliance with the provisions
27 of this Paragraph, the Settling Parties shall be liable to EPA

1 for any violation of Consent Decree requirements committed by
2 their contractors, unless otherwise excused by the terms of this
3 Decree or by the EPA.

4 B. The Settling Parties shall implement the Remedial Action
5 as that term is defined in this Consent Decree in accordance with
6 the terms and schedules set forth in the Decree and its Appen-
7 dices.

8 C. This Consent Decree shall not affect any claims by or
9 against the State of Arizona arising out of or in connection with
10 the Tucson International Airport Area Superfund Site. The State
11 of Arizona and the Settling Parties reserve all defenses to such
12 claims.

13

14

IV. PURPOSE

15 A. The purpose of this Consent Decree is to serve the
16 public interest by protecting the public health, welfare, and the
17 environment from releases and threatened releases of hazardous
18 substances at the Site by implementation of the Remedial Action.
19 The Parties stipulate and the Court hereby finds that the Record
20 of Decision for purposes of this Consent Decree is consistent
21 with the National Oil and Hazardous Substances Pollution Contin-
22 gency Plan ("NCP"), 40 C.F.R. Part 300. The Record of Decision
23 for this Remedial Action is set forth in Appendix A.

24 B. The Settling Parties recognize that EPA has conducted
25 and currently plans to conduct additional studies at the Site to
26 determine, among other things, the extent of soil contamination
27 at the Tucson International Airport Area Superfund Site. The

1 Parties recognize that soil characterization and remediation is
2 beyond the scope of this Consent Decree and that nothing in this
3 Consent Decree shall bar EPA from using the results of existing
4 or future studies in a subsequent action seeking to compel soil
5 remediation.

6

7 V. OBLIGATIONS FOR THE REMEDIAL ACTION

8 A. Settling Parties shall be obligated to fund and imple-
9 ment the Remedial Action as provided in this Decree.

10 B. Notwithstanding any approvals which may be granted
11 by the EPA or other governmental entities, the Settling Parties
12 shall remain liable for attainment of each of the performance ob-
13 jectives set forth in the ROD. Those objectives are as follows:

14 1. Control Contaminant Migration. To control the
15 migration of groundwater contamination at the Site by extracting
16 all groundwater in Area A that contains volatile organic com-
17 pounds (VOCs) at levels above their respective MCLs. Groundwater
18 shall be extracted at such locations and rates as is necessary to
19 prevent groundwater containing VOCs at concentrations greater
20 than MCLs within Area A from migrating beyond the area of capture
21 of the well field designed as part of the Remedial Action.

22 2. Aquifer Remediation. To restore aquifer water
23 quality in Area A by reducing chemical contaminant concentrations
24 in Area A to no more than the MCLs.

25 3. Treatment of Extracted Groundwater. To treat ex-
26 tracted groundwater with packed column aeration to a TCE con-
27 centration not to exceed 1.5 micrograms per liter (parts per

1 billion), a level that EPA believes will achieve an overall ex-
2 cess cancer risk level of 1×10^{-6} for chemical contaminants in
3 the treated water.

4 C. Neither this Consent Decree, nor any approvals of plans,
5 reports, or specifications by EPA shall be deemed to be a war-
6 ranty that the activities approved by EPA will result in the at-
7 tainment of the performance objectives set forth above. If the
8 EPA determines that the well field or treatment facility designed
9 and approved pursuant to Section VII ("Work to Be Performed")
10 fails to meet the performance objectives set forth in Sub-
11 paragraph V.B above, EPA shall, at its discretion, require the
12 Settling Parties to resubmit according to a schedule set forth by
13 EPA a well field design or treatment facility design that will
14 meet the performance objectives. The Settling Parties shall not
15 be liable for stipulated penalties for the failure of any well
16 field or treatment facility to meet the performance objectives,
17 provided that such well field or treatment facility is con-
18 structed according to approved designs and operated in compliance
19 with any approved operating plan.

20 D. Settling Parties shall complete the Remedial Action in
21 accordance with the National Contingency Plan, and in accordance
22 with the standards, specifications, and schedule of completion
23 set forth in or approved by EPA pursuant to Section V
24 ("Obligations for the Remedial Action"), Section VI ("Specific
25 Obligations of the Settling Parties"), Section VII ("Work to Be
26 Performed") and Appendix A herein.

27

1 E. Takeover of Work. EPA reserves its rights pursuant to
2 Section XVIII ("Response Authority") to take over a portion or
3 all of the Remedial Action. In the event that EPA assumes per-
4 formance of all of the remaining Remedial Action based upon an
5 EPA determination that Settling Parties have failed to perform
6 any substantial portion of the Remedial Action or have performed
7 any substantial portion of the Remedial Action in such an inade-
8 quate or untimely manner such that, in either of such cir-
9 cumstances, the successful, timely completion of the Remedial Ac-
10 tion is in jeopardy, the Settling Parties shall pay a penalty of
11 one million dollars (\$1,000,000) ("takeover of work penalty").

12 In the event the failure to perform or the inadequate or un-
13 timely performance that has resulted in the takeover of work
14 penalty is due to a lack of funding, and EPA has received notice
15 from the Trustee pursuant to Subparagraph B.1.b of Section VI
16 ("Specific Obligations of the Parties"), only the Settling
17 Parties which have failed to make payments to the trust account
18 shall be liable for payment of the takeover of work penalty.

19 The takeover of work penalty shall be paid within thirty
20 (30) days after EPA provides written notice of its decision to
21 take over the remaining Remedial Action and to assess the
22 takeover of work penalty unless the Settling Parties invoke dis-
23 pute resolution. If the Settling Parties invoke dispute resolu-
24 tion and EPA prevails, Settling Parties shall pay, at the conclu-
25 sion of the Dispute Resolution process, the takeover of work
26 penalty, plus interest as specified in 42 U.S.C. § 9607.

27

1 In addition, if EPA determines that there has been inade-
2 quate or untimely performance of a portion or all of the Remedial
3 Action and if EPA takes over a portion or all of the remaining
4 Remedial Action, the Settling Parties shall reimburse EPA for the
5 costs of doing such work EPA takes over within sixty (60) calen-
6 dar days of receipt of demand for payment of such costs. Set-
7 tling Parties reserve the right to contend, through Dispute
8 Resolution, that such costs were not actually incurred or were
9 incurred in a manner inconsistent with the NCP. Any demand for
10 payment made by EPA pursuant to this provision shall include cost
11 documentation that verifies that the claimed costs were incurred
12 and that the amount of the demand was properly calculated. EPA
13 may demand payment for costs under this Section any time within
14 six years after costs are incurred.

15 The appropriate Settling Parties shall also be liable for any
16 stipulated penalties that accrued to them respectively prior to
17 EPA's decision to take over the remaining Remedial Action.

18 F. Except as necessary to address an imminent and substan-
19 tial endangerment to human health or the environment, if EPA
20 decides to take over a portion or all of the Remedial Action, EPA
21 will provide Settling Parties' Project Coordinator with written
22 notice of such decision ten (10) days before EPA takes over such
23 work. In any event of takeover, EPA shall give written notice to
24 all Settling Parties except MDC, not later than ten (10) days
25 after any such takeover stating the reason for the takeover and
26 what portion(s) of the Remedial Action is (are) being taken over.

27

1 VI. SPECIFIC OBLIGATIONS OF THE SETTling PARTIES

2 A. Work Settling Parties

3 1. The City of Tucson shall:

4 a. Furnish needed well sites and a treatment
5 facility site;

6 b. Operate and maintain the well field and
7 groundwater treatment facility;

8 c. Accept water treated as required under this
9 Decree unless such water cannot be delivered to domestic cus-
10 tomers without violating state or federal law.

11 d. Commencing at the time of the Start-up Date (as
12 that term is defined in Section VII ("Work to Be Performed")),
13 sample and analyze the treated water from the groundwater treat-
14 ment facility no less often than weekly using EPA Method 502.2 or
15 an alternative method approved by EPA in writing.

16 e. Furnish the following deliverables:

17 i. Periodic Progress Reports

18 ii. Annual Quality Assurance Reports

19 2. The City of Tucson, Hughes, USAF and the Tucson Air-
20 port Authority shall have joint responsibility for furnishing the
21 following deliverables, as described in Section VII ("Work to be
22 Performed"):

23 a. Draft Field Operations Plan

24 b. Final Field Operations Plan

25 c. Well Field Data Analysis Report

26 d. Final Well Field Design

27 e. PPE 30% Design

- 1 f. PPE 70% Design
- 2 g. PPE Final Design
- 3 h. Draft Start-up Plan
- 4 i. Final Start-up Plan
- 5 j. Start-up Date
- 6 k. Draft Routine Operating Plan
- 7 l. Final Routine Operating Plan
- 8 m. Official Start Date

9 B. Funding Settling Parties

10 1. Settling Parties. Settling Parties shall present to
11 EPA a signed Trust Agreement establishing the "Trust Fund" within
12 ten working days after the effective date of this Consent Decree.
13 The Trust Agreement shall confer upon the Trustee all power and
14 authority necessary to fulfill its obligations under this Consent
15 Decree. The Trust Agreement shall authorize the Trustee to use
16 the money in the Trust Fund for among other purposes, (1) paying
17 the Contractor(s) for the work undertaken pursuant to this
18 Decree, and (2) reimbursing the United States for its Response
19 and Oversight Costs as provided in Section XIX hereof. Payment
20 of money into the Trust Fund by the Settling Parties is not a
21 fine, penalty, or monetary sanction.

22 a. The Trust Agreement shall require the Trustee to
23 report quarterly to the Settling Parties (except MDC) and to EPA.
24 The Trustee shall submit its initial report on the first day of
25 the second full calendar month after the effective date of the
26 Consent Decree. Subsequent reports shall be submitted quarterly
27 thereafter. Each report shall contain a projection of all costs

1 that the Settling Parties expect to incur in complying with this
2 Consent Decree during the two quarters following submission of
3 the report as well as a current accounting of the amount of money
4 in the Trust Fund. If the amount of money in the Trust Fund is
5 less than the amount projected by the Trustee's report to be
6 needed to pay for all Site-related work for the next two calendar
7 quarters, the appropriate Settling Party(ies) pursuant to this
8 Paragraph VI.B shall deposit in the Trust Fund by the 30th day of
9 the quarter, sufficient money to bring the level of the Trust
10 Fund up to the amount projected to be needed for the following
11 two calendar quarters. Any money remaining in the Trust Fund
12 after Termination and Satisfaction (Section XXXIII) of the
13 Remedial Action shall be returned to the Settling Parties in ac-
14 cordance with the terms of the Trust Agreement, and any money
15 returned to the United States for payments made by or on behalf
16 of the USAF shall be deposited in the United States Treasury pur-
17 suant to the Miscellaneous Revenue Act, 26 U.S.C. §1 et seq.

18 b. In the event of a failure of any Settling Party
19 to make a payment required of it by the 30th day of the quarter,
20 the Trustee shall promptly give written notice of such failure to
21 the EPA and all of the Settling Parties except MDC. Each such
22 notice shall state the name of the Settling Party which is in
23 default, the amount of the delinquent payment and the date such
24 payment became due.

25 c. In the event that any Settling Party is required
26 under this Consent Decree to pay any amount in excess of the
27 amount that it is required to pay pursuant to the "Master Par-

1 ticipation and Trust Agreement" to which the Settling Parties
2 (except MDC) have agreed, such Settling Party may bring an action
3 to enforce the provisions of the "Master Participation and Trust
4 Agreement", and such Agreement shall prevail as among such
5 parties. Provided, however, that, in no event shall a dispute
6 among the Settling Parties concerning the proper allocation of
7 liability pursuant to the "Master Participation and Trust Agree-
8 ment" serve to delay the timely funding of the Trust Fund estab-
9 lished pursuant to this Consent Decree.

10 d. Notwithstanding the existence of the Trust Fund,
11 Settling Parties remain responsible for their respective obliga-
12 tions in funding and in performing the Remedial Action required
13 by this Consent Decree.

14 2. McDonnell Douglas Corporation. MDC, within 90 days
15 after entry of this Consent Decree, shall pay to the Trustee the
16 sum of \$500,000. Notwithstanding any other provision in this
17 Consent Decree to the contrary, the only liability or respon-
18 sibility that MDC shall have under this Consent Decree is to make
19 a payment in the amount of \$500,000 into the Trust Fund. Such
20 payment shall fulfill all of MDC's responsibilities under this
21 Consent Decree and entitle MDC to the Covenant Not to Sue under
22 Section XXIV ("Covenant Not to Sue") and Contribution Protection
23 under Section XXV ("Contribution Protection"), without regard to
24 whether any of the other Parties fulfill their obligations under
25 this Decree. Without limiting the foregoing statement, MDC shall
26 not have any responsibility for fulfillment of the obligations
27 imposed upon Settling Parties by Section V ("Obligations for the

1 Remedial Action"), Section VI ("Specific Obligations of the Set-
2 tling Parties") or Section VII ("Work to Be Performed") of this
3 Decree.

4 3. United States Air Force. Within 90 days after the
5 entry of this Consent Decree, USAF or the United States on behalf
6 of the USAF shall, in consideration of the contribution protec-
7 tion specified in Section XXV ("Contribution Protection") and of
8 the covenant not to sue specified in Section XXIV ("Covenant Not
9 to Sue"), pay to the Trustee the sum of Two Million, Five Hundred
10 Thousand Dollars (\$ 2,500,000). After the TAA has paid Two Mil-
11 lion, Five Hundred Thousand Dollars (\$ 2,500,000) pursuant to
12 Subparagraph VI.B.4 below, the USAF or the United States on be-
13 half of the USAF shall, as needed, pay to the Trustee 50% of all
14 additional payments required to implement the Remedial Action un-
15 til the Remedial Action has been completed pursuant to Section
16 XXXIII ("Termination and Satisfaction"); provided, however, that
17 upon a final reallocation of the responsibility for bearing such
18 costs pursuant to Subparagraph VI.B.6, this Consent Decree shall
19 be amended accordingly.

20 It is the intent and expectation of the United States and
21 the USAF that the payments referred to in this Subparagraph
22 VI.B.3 will be fully funded from the Defense Environmental Res-
23 toration Transfer Account, with the exception of Oversight Costs
24 under Paragraph XIX.B, stipulated penalties under Section VIII
25 ("Stipulated Penalties"), the takeover of work penalty under
26 Paragraph V.D, and interest costs. The United States on behalf
27 of the USAF recognizes its responsibility, among other obliga-

1 tions, to pay its share of Oversight Costs, stipulated penalties,
2 the takeover of work penalty, and interest costs. Such items
3 which have not been paid shall be included in any Final Settle-
4 ment or any judgment which occurs before or after the Realloca-
5 tion process provided for in subparagraph VI.B.6. It is the in-
6 tent and expectation of the United States and the USAF that
7 the amount of any USAF responsibility to pay Oversight Costs,
8 Stipulated Penalties, the Takeover of Work Penalty, and interest
9 costs reflected in a Final Settlement or any judgment against the
10 United States or USAF as provided for in this subsection will be
11 fully funded through the permanent, continuing, and unlimited ap-
12 propriation for judgments provided for in 31 U.S.C. § 1304
13 (Judgment Fund). Provided, however, that if for any reason the
14 Judgment Fund will not pay any portion of the USAF share when
15 due, the USAF shall, through the appropriate budgetary process,
16 request that the Congress authorize and make specific appropria-
17 tion or appropriations of an amount or amounts sufficient to pay
18 such sums or to reimburse the Party or Parties who have advanced
19 such sums. The USAF's obligation to seek appropriations under
20 this subsection shall not be construed as a limitation on the ex-
21 tent of the obligation of USAF or the United States to reimburse
22 any Party for any amount owed, nor shall this obligation be con-
23 strued to prevent or delay the initiation of any appropriate
24 proceedings by a Party against the USAF or the United States to
25 recover any debt owed to it.

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1 Either before or after the Reallocation process has oc-
2 curred, if any of the obligations of the USAF under this Consent
3 Decree are not met in a timely fashion, whether because of a lack
4 of appropriations or otherwise, and if any other Party to this
5 Consent Decree performs any such USAF obligations pursuant to the
6 provisions of this Consent Decree, then and in any such event the
7 performing party shall have the right to initiate an action in
8 any appropriate forum for recovery of the amounts expended in
9 performing any such obligations. Any judgment awarded on such a
10 claim may include an award of costs, attorneys' fees and interest
11 to the extent provided for by statute.

12 Payments by or on behalf of the USAF referred to in this
13 Subparagraph VI.B.3 or anywhere else in this Consent Decree shall
14 be subject to the availability of appropriated funds, and nothing
15 contained in this Section or elsewhere in this Consent Decree
16 shall be construed to require the obligation or expenditure of
17 any funds in violation of the "Anti-Deficiency Act",
18 31 U.S.C. §§ 1304, 1341, 1342, 1349-51, 1511-1519.

19 4. Tucson Airport Authority. After the Two Million,
20 Five Hundred Thousand Dollars (\$ 2,500,000) has been paid by or
21 on behalf of the USAF pursuant to Subparagraph VI.B.3 above, the
22 TAA shall make payments to the Trustee as needed to implement the
23 Remedial Action until it has paid a total of Two Million, Five
24 Hundred Thousand Dollars (\$2,500,000). Thereafter, the TAA shall
25 pay 50% of all additional payments as needed which are required
26 to implement the Remedial Action until the Remedial Action has
27 been completed pursuant to Section XXXIII ("Termination and

1 Satisfaction"); provided, however, that upon a final reallocation
2 of the responsibility for bearing such costs pursuant to Sub-
3 paragraph VI.B.6, this Consent Decree shall be amended accord-
4 ingly.

5 5. Oversight Costs. Oversight Costs under Paragraph
6 XIX.B shall be funded in the first instance from the principal
7 and income from the payment made by MDC under Subparagraph
8 VI.B.2, then, to the extent needed, from the income from payments
9 made by or on behalf of the USAF under Subparagraph VI.B.3, and
10 finally, to the extent needed, from the payment made by TAA under
11 Subparagraph VI.B.4. Such payments by TAA will be credited to
12 its payment obligations under Subparagraph VI.B.4. No payments
13 for Oversight Costs shall be made from any funds paid by the USAF
14 from the Defense Environmental Restoration Transfer Account ex-
15 cept that income from such contributions may be used for such
16 payments.

17 6. Reallocation and Final Settlement. All payments by
18 or on behalf of the USAF and the TAA under this Decree (other
19 than those for penalties) shall be adjusted according to the fol-
20 lowing reallocation procedure:

21 a. Within one month after a settlement or a dis-
22 positive ruling, including appeals, in the case of Valenzuela v.
23 Hughes Aircraft Co. (CIV 85-903-TUC-WDB) and all other state or
24 federal cases based upon related facts ("Final Ruling"), USAF and
25 TAA shall select a mediator to attempt to resolve the issues
26 relevant to a final allocation of responsibility between them for
27 a period of six (6) months, or until such other time as the TAA

1 and the USAF agree that the mediator's services should be ter-
2 minated. An agreement on said issue may be entered into only
3 with a written consent of the Settling Parties other than MDC who
4 are not parties to such agreement; such consent shall not be un-
5 reasonably withheld. If an agreement is reached, the Settling
6 Parties other than MDC will consent to modification of this Con-
7 sent Decree by the Court, which modification will constitute a
8 final allocation of responsibility as among the Settling Parties.

9 b. If USAF and TAA fail to resolve the reallocation
10 within the time specified in Subparagraph VI.B.6.a above, then
11 either party shall have the right to petition the Court to hear
12 and determine the reallocation issue and render declaratory judg-
13 ment accordingly. In such event, this Decree shall be amended
14 accordingly. In any such proceeding, the provisions of Section
15 II.B. shall be applicable.

16 c. Fees and Expenses. All fees and expenses of the
17 mediator shall be funded equally by the USAF and TAA and shall be
18 reallocated as all other funds at issue.

19 d. MDC Contribution. MDC waives the right to
20 recover any payments through the reallocation process and
21 covenants not to initiate any claim or action against any other
22 Settling Party for Covered Matters. As appropriate, the USAF and
23 TAA, by means of mediation, or the Court shall decide how MDC's
24 payment is credited between USAF and TAA.

25 e. Relative USAF and TAA Responsibility Defined for
26 the Purposes of Reallocation. For the purpose of the realloca-
27 tion, USAF shall include the United States Air Force and its com-

1 ponent commands, the National Guard Bureau, the Arizona Air Na-
2 tional Guard, Hughes, its predecessors as operators of Air Force
3 Plant #44 and any support activities in or about said facility,
4 and any other entity whose interests and responsibilities are as-
5 signed to USAF by the parties if they agree upon the realloca-
6 tion, or by the Court if it makes such determination. For the
7 purpose of the reallocation, TAA shall include the Tucson Airport
8 Authority, the City of Tucson and any other entity whose inter-
9 ests and responsibilities are assigned to TAA by the parties if
10 they agree upon reallocation or by the Court if it makes such
11 determination. To the extent that the liability for Response
12 Costs, Oversight Costs and costs of the Remedial Action of a per-
13 son or entity not party to this Consent Decree are assigned and
14 charged to USAF in the reallocation process, then USAF shall be
15 thereby subrogated to all rights to recover such amounts from
16 such person or entity not party to this Consent Decree. To the
17 extent that the liability of a person or entity not party to this
18 Consent Decree is assigned and charged to TAA in the reallocation
19 process, then TAA shall be thereby subrogated to all rights to
20 recover such amounts from such person or entity not party to this
21 Consent Decree. In the reallocation to be made between TAA and
22 USAF, only the monetary payments made by or on behalf of TAA and
23 USAF shall be reallocated. Neither TAA nor USAF will be credited
24 with or charged for any in-kind services contributed by Hughes or
25 the City nor credited with or charged for the real property in-
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1 terests contributed by the City or the physical facilities and
2 volumes of treated water to be received by the City under the
3 provisions of this Consent Decree.

4 f. Value of Contribution and Interest. Upon
5 modification of the Consent Decree, the responsibilities for
6 funding of the Remedial Action shall be borne by the USAF and TAA
7 as specified in the Reallocation. Any amount determined as a
8 result of the Reallocation process to be owed by one party to the
9 other to adjust for past payments made shall be paid without in-
10 terest within one calendar year after the modification of the
11 Consent Decree.

12 g. Final Settlement. It is the desire of the Set-
13 tling Parties to provide for a Final Settlement process which
14 will allow the United States on behalf of the USAF and the USAF
15 to fully and finally meet their responsibilities and obligations
16 under this Consent Decree through payment of a liquidated sum
17 from the permanent, continuing, and unlimited appropriation for
18 judgments provided for in 31 U.S.C. §1304 (Judgment Fund), while
19 ensuring the Remedial Action is accomplished. The Parties fur-
20 ther intend that such Final Settlement will anticipate any then
21 unforeseen costs and expenses and that the amount of the Final
22 Settlement will not result in uncompensated financial burdens on
23 other Parties which would have otherwise been the responsibility
24 of the United States on behalf of the USAF or the USAF. As part
25 of or upon the conclusion of the Reallocation process under this
26 Subparagraph VI.B.6, the Parties other than MDC will engage in a
27 good faith settlement process to determine, pursuant to the Real-

1 location, a final dollar amount to liquidate any unpaid past and
2 all of the estimated future USAF or United States financial
3 responsibility for Covered Matters (the "Final Settlement"),
4 which sum shall include an amount to account for the economic
5 risk attendant to a settlement before Termination and Satisfac-
6 tion (Section XXXIII).

7 To initiate this process, representatives of the EPA and the
8 USAF shall confer in an effort to reach agreement on the terms of
9 a proposed Final Settlement that will be offered to the TAA and
10 to Hughes. The United States on behalf of the USAF may then make
11 a good faith offer of a proposed Final Settlement simultaneously
12 to the TAA and Hughes which the TAA shall have ninety (90) calen-
13 dar days from the date of its receipt to accept. If TAA does not
14 accept the offer within the 90 calendar days, Hughes may accept
15 the offer at any time during the following 90 calendar days.
16 During that 180 day period, the offer shall not be modified. If
17 that process does not result in an agreed upon Final Settlement,
18 the Parties may continue negotiations in an effort to reach a
19 Final Settlement. A Final Settlement Agreement may be entered
20 into only with written consent of the Parties other than MDC who
21 are not parties to the Final Settlement Agreement.

22 If, after consideration of the recommendations of EPA and
23 the USAF, the Department of Justice approves a Final Settlement
24 offer which is accepted, the United States shall take appropriate
25 steps to have that Final Settlement promptly paid by the United
26 States on behalf of the USAF, from the Judgment Fund. Any funds
27 which were temporarily advanced by any Settling Party to satisfy

1 the liability and obligations of the USAF under this Consent
2 Decree which have not already been reimbursed, whether for costs
3 and expenses for Covered Matters, penalties or interest, shall be
4 reimbursed as part of the Final Settlement.

5 i. Effect of Final Settlement for USAF. If
6 the United States on behalf of USAF concludes an agreement upon a
7 Final Settlement with either TAA or Hughes, the Parties shall
8 consent to modification of this Decree by the Court consistent
9 with the Final Settlement. The USAF and/or the United States on
10 behalf of the USAF shall pay the agreed upon amount of the Final
11 Settlement to the Trustee to: (1) fund the remaining reallocated
12 obligation for Covered Matters; (2) reimburse any Settling Party
13 for advances which such Settling Party has made to satisfy
14 obligations to EPA or any other Settling Party which have accrued
15 under this Decree prior to the date on which it is modified to
16 reflect the Final Settlement. Such payment together with income
17 therefrom, shall be referred to as the "USAF Account". After
18 such payment, the USAF shall cease its participation on the Set-
19 tling Parties' Steering Committee, and USAF and the United States
20 on behalf of the USAF shall have no further obligations under
21 this Consent Decree other than those which have accrued. The
22 USAF and the United States on behalf of the USAF, however, shall
23 continue to be entitled to the Covenant Not to Sue under Section
24 XXIV, Contribution Protection under Section XXV, Third Party
25 Claims protection under Section XXV-A and such other rights and
26 protections as are afforded by the Consent Decree.

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1 ii. Settlement Through the Agreement of TAA and
2 the USAF. If a Final Settlement is agreed upon by TAA and the
3 United States on behalf of the USAF, TAA shall, upon deposit of
4 the amount of the Final Settlement with the Trustee, be obligated
5 to discharge the remaining funding obligations which the USAF
6 would otherwise be obligated to discharge under Section VI of
7 this Decree, and which cannot be met by the USAF Account. The
8 Trustee shall utilize the USAF Account to pay the USAF portion of
9 the remaining funding obligation for Covered Matters, as deter-
10 mined pursuant to the Reallocation process, as if the USAF con-
11 tinued to be responsible for such payments under the Decree. The
12 Trustee shall comply with instructions from TAA as to investments
13 of the USAF Account. If the USAF Account becomes insufficient to
14 cover the USAF portion of the remaining funding obligation for
15 Covered Matters, TAA shall be responsible for curing any such
16 funding shortfall. If there are assets remaining in the USAF Ac-
17 count subsequent to Termination and Satisfaction pursuant to Sec-
18 tion XXXIII of this Decree, the Trustee shall distribute to TAA
19 such remaining assets.

20 If TAA and the USAF agree upon a Final Settlement, and after
21 the Final Settlement payment has been made to the Trustee, Hughes
22 will have no further obligations under this Decree, except as
23 provided below, other than those which have accrued, and shall
24 thereafter not participate on the Steering Committee, but shall
25 continue to be entitled to the Covenant Not to Sue under Section
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1 XXIV, Contribution Protection under Section XXV, Third Party
2 Claims protection under Section XXV-A and such other rights and
3 protections as are afforded by the Consent Decree.

4 Such Final Settlement shall have no application to any
5 obligation of USAF beyond the scope of Covered Matters nor shall
6 such Final Settlement have any application to any liability or
7 responsibility which arises because the EPA exercises its
8 authority to reopen under Section XXIV.D. Nor shall such Final
9 Settlement affect EPA's administrative rights with regard to the
10 USAF in the event that both TAA and the City default in carrying
11 out their funding obligations under subsection (g) of the Consent
12 Decree, and EPA has been unable to obtain compliance by TAA and
13 the City. In the event that EPA exercises its administrative
14 rights against the USAF in an effort to compel the USAF to dis-
15 charge the funding obligations of the City and TAA pursuant to
16 this subsection (g) and the USAF does not do so, then Hughes,
17 within 30 days of receipt of notice by EPA, shall deposit into
18 the Trust Fund such sums as are due and owing by the USAF.

19 iii. Settlement through the Agreement of Hughes
20 and the USAF. If a Final Settlement is agreed upon between
21 Hughes and the United States on behalf of USAF, Hughes shall,
22 upon deposit of the amount of the Final Settlement with the
23 Trustee, be obligated to discharge the remaining funding obliga-
24 tions which the USAF would otherwise be obligated to discharge
25 under Section VI of this Decree, and which cannot be met by the
26 USAF Account. The Trustee shall utilize the USAF Account to pay
27 the USAF portion of the remaining funding obligation for Covered

1 Matters, as determined pursuant to the Reallocation process, as
2 if the USAF continued to be responsible for such payments under
3 the Decree. The Trustee shall comply with instructions from
4 Hughes as to investments of the USAF Account. If the USAF ac-
5 count becomes insufficient to cover the USAF portion of the
6 remaining funding obligation for Covered Matters, Hughes shall be
7 responsible for curing any such funding shortfall. If there are
8 assets remaining in the USAF Account subsequent to Termination
9 and Satisfaction pursuant to Section XXXIII of this Decree, the
10 Trustee shall distribute to Hughes such remaining assets.

11 Such Final Settlement shall have no application to any
12 obligation of USAF beyond the scope of Covered Matters nor shall
13 such Final Settlement have any application to any liability or
14 responsibility which arises because the EPA exercises its
15 authority to reopen under Section XXIV.D. Nor shall such Final
16 Settlement affect EPA's administrative rights with regard to the
17 USAF in the event that Hughes defaults in carrying out its fund-
18 ing obligations under this Consent Decree.

19 h. Limitations. Upon the effective date of this
20 Decree, the provisions for Reallocation shall be treated as an
21 action among TAA, Hughes, and USAF, all seeking Reallocation un-
22 der Subparagraph VI.B.6; the running of the statute of limita-
23 tions applicable to claims to be determined by Reallocation shall
24 upon the effective date be tolled.

25 7. City of Tucson. By the 60th day of each quarter
26 for which the Trustee submits a report to the Parties pursuant to
27 Subparagraph VI.B.1.a, the City shall deposit into the Trust Fund

1 any unpaid sums due and owing by TAA under Subparagraph VI.B.4.
2 If and when the City deposits all such sums, TAA shall not be
3 deemed to be in default under this Decree for nonpayment of such
4 sums, but it shall reimburse the City for the amount of any such
5 payment together with interest at the rate of 10% per annum (or
6 other rate which the City and TAA in writing either have agreed
7 upon or in the future may agree upon) together with any other
8 damages, including costs, expenses and attorneys' fees, incurred
9 because of such default. The City shall have the right to in-
10 stitute any appropriate action to enforce this indemnity.

11 8. Hughes. By the 60th day of each quarter for which
12 the Trustee submits a report to the Parties pursuant to Sub-
13 paragraph VI.B.1.a, Hughes shall deposit into the Trust Fund any
14 unpaid sums due and owing by or on behalf of the USAF under Sub-
15 paragraph VI.B.3. If and when Hughes deposits all such sums,
16 USAF shall not be deemed to be in default under this Decree for
17 nonpayment of such sums. Provided, however, that Hughes has no
18 obligation with respect to the initial \$2,500,000 to be deposited
19 into the Trust Fund by the USAF or the United States on behalf of
20 USAF pursuant to Subparagraph VI.B.3. Hughes shall have the
21 right to initiate any appropriate action to enforce its right to
22 reimbursement from the USAF for any sums advanced on behalf of
23 the USAF

24 9. Request for Appropriations. If for any reason it
25 appears that the Judgment Fund will not be available to pay any
26 USAF contribution, USAF will through the appropriate budgetary
27 process request that the Congress authorize and make a specific

1 appropriation or appropriations of an amount or amounts suffi-
2 cient to pay such sums or to reimburse the Party or Parties who
3 have advanced such sums.

4 10. USAF Penalty Payments. Stipulated penalties under
5 Section VIII and the takeover of work penalty under Paragraph V.D
6 will not be funded from the Defense Environmental Restoration
7 Transfer Account. In the event USAF becomes responsible for
8 making such payments before the completion of the Remedial Action
9 and does not do so, Hughes shall, subject to the conditions and
10 limitations set forth in Subparagraph VI.B.8, deposit into the
11 Trust Fund all such payments due and owed by USAF. In the event
12 Hughes makes such payments, USAF will through the appropriate
13 budgetary process request that the Congress authorize and make a
14 specific appropriation or appropriations of an amount or amounts
15 sufficient to reimburse Hughes for such payments. If USAF fails
16 to obtain such an appropriation or appropriations, the USAF's
17 obligation to reimburse Hughes for the same shall be satisfied at
18 the time of the Reallocation and Final Settlement pursuant to
19 subparagraph VI.B.6. Nothing in this Consent Decree shall limit
20 Hughes' right to maintain an action at any time for any breach by
21 USAF or the United States on behalf of the USAF of its obliga-
22 tions under this section.

23 11. Transfer of Work Product to Trustee: While nego-
24 tiating this Consent Decree, some of the Settling Parties have
25 incurred expenses and obligations and acquired rights, services
26 and work products on the Stevens investigation of the Site prior
27 to the issuance of EPA Order #89-03 and some have incurred ex-

1 penses and obligations in the commencement of Remedial Action un-
2 der Order #89-03. At such time as this Decree becomes effective,
3 TAA, the City and Hughes shall transfer those rights, services
4 and work products, at cost, to the Trustee under this Decree and
5 the Trustee shall accept and assume responsibility for all of the
6 rights, services and work products developed as the result of
7 such expenses and obligations and all contracts entered into by
8 and with the City (with the concurrence of TAA and Hughes) in
9 furtherance of the Remedial Action now required under this Con-
10 sent Decree. If the Steering Committee created in connection
11 with this Decree, consisting of representatives of TAA, the City,
12 Hughes and USAF, confirms the decisions theretofore made by TAA,
13 the City and Hughes in connection with performance under EPA Or-
14 der #89-03, then the Trustee under this Decree shall be in-
15 structed to and shall pay, out of the initial \$2,500,000 paid by
16 USAF under Subparagraph VI.B.3., to TAA, the City and Hughes,
17 amounts equal to all expenses incurred and obligations undertaken
18 and paid by them in the Stevens investigation of the Site and in
19 the commencement of Remedial Action under Order #89-03 to the
20 same extent that such expenses and obligations would have been
21 paid out of such funds had they then been incurred under this
22 Decree. Nothing contained in this paragraph and nothing done to
23 implement the provisions thereof shall relieve any of the Set-
24 tling Parties of obligations imposed upon them by the provisions
25 of this Consent Decree.

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1 VII. WORK TO BE PERFORMED

2 A. Settling Parties shall perform all work necessary to
3 implement the Remedial Action, and shall achieve the performance
4 objectives specified in Section V ("Obligations for the Remedial
5 Action"). All design and construction obligations of this Sec-
6 tion VII ("Work To Be Performed") shall be effective upon the ef-
7 fective date of this Consent Decree.

8 B. All of the work to be performed pursuant to this Consent
9 Decree shall be performed by qualified employees or Contractors
10 of the Settling Parties in accordance with the schedules set
11 forth in this Consent Decree.

12 C. The Settling Parties, as specified below, shall submit
13 the following deliverables according to the schedule set forth in
14 paragraph E below:

15 D. Deliverables

16 1. Periodic Progress Reports

17 a. Commencing with the second month after the ef-
18 fective date of this Consent Decree, the City shall provide writ-
19 ten progress reports to EPA according to the following schedule:

20 i. Until the end of the Start-up Period, the
21 City shall submit Periodic Progress Reports
22 by the 10th day of each month for the previ-
23 ous calendar month.

24 ii. Subsequent to the Start-up Period, the City
25 shall submit Periodic Progress Reports on a
26 quarterly basis. The City shall submit the
27 first such Periodic Progress Report by the

1 15th day of the fourth full calendar month
2 after the Official Start Date. The City
3 shall submit subsequent reports quarterly
4 thereafter.

5 b. Periodic Progress Reports shall include:

- 6 i. a description of the actions taken during
7 the reporting period to comply with this
8 Consent Decree, including a general descrip-
9 tion of Remedial Action activities commenced
10 or completed during the reporting period;
11 ii. a compilation of all water quality and
12 hydrogeologic data generated pursuant to
13 this Consent Decree during the period being
14 reported, provided that such data are in the
15 possession of the City five working days
16 prior to the time the Periodic Progress
17 Report is due. If the data are not in the
18 possession of the City five days prior to
19 the time the Periodic Progress Report is
20 due, the City shall indicate in the Periodic
21 Progress Report that the data were generated
22 during the period being reported and that
23 the compilation of the data will be sub-
24 mitted in the next Periodic Progress Report;
25 iii. Remedial Action activities projected to be
26 commenced or completed during the next
27 reporting period, and any problems that have

1 been encountered or are anticipated by the
2 Settling Parties in commencing or completing
3 the Remedial Action activities.

4 c. Periodic Progress Reports submitted after the
5 Official Start Date shall include a computation
6 of a time-weighted average of the TCE concentra-
7 tion in the groundwater treatment facility ef-
8 fluent, pursuant to Appendix B of this Consent
9 Decree. The Periodic Progress Reports shall in-
10 clude a listing of all of the TCE concentrations
11 and time periods that were used in computing the
12 time-weighted average pursuant to Appendix B.

13 2. Annual Quality Assurance Report. The Annual Quality
14 Assurance Report shall document the City's internal auditing of
15 its compliance with Section XII ("Quality Assurance/Quality
16 Control") of this Consent Decree and with the QA/QC Plans
17 developed pursuant to this Consent Decree. The Report shall
18 identify any compliance problems identified during the internal
19 audit. For any problems identified in the Report, the Report
20 shall also provide suggested changes for improved compliance.

21 3. Draft Field Operations Plan. The Plan shall incor-
22 porate at a minimum:

23 a. Quality Assurance/Quality Control (QA/QC) Plan
24 which shall consist of the following elements:

- 25 1) project description
26 2) project organization and QA/QC respon-
27 sibilities

- 1 3) laboratory contractor requirements and
- 2 selection criteria
- 3 4) rationale for measurement data
- 4 5) field sampling procedures
- 5 6) laboratory QA/QC including internal audit
- 6 procedures
- 7 7) data reduction, validation, assessment and
- 8 reporting procedures
- 9 8) internal quality assurance reporting proce-
- 10 dures
- 11 b. Worker Health and Safety Plan which shall con-
- 12 sist of:
- 13 1) site history and background information
- 14 2) source of specifications
- 15 3) key personnel, responsibilities and ad-
- 16 ministration
- 17 4) job hazard and risk assessment for work
- 18 zones
- 19 5) description of personal protection equipment
- 20 6) equipment and personnel decontamination pro-
- 21 cedures
- 22 7) safe working practices and accident preven-
- 23 tion program
- 24 8) personnel training requirements and safety
- 25 meetings
- 26 9) medical surveillance programs
- 27 10) emergency response plan, medical assistance

1 and first aid equipment

2 11) communications

3 c. Sampling Plan which shall consist of:

4 1) objectives of sampling plan

5 2) sampling locations

6 3) sampling frequency

7 4) parameters to be analyzed

8 5) rationale for specific sampling events

9 4. Final Field Operations Plan. The Final Field Opera-

10 tions Plan shall address all EPA comments resulting from the

11 review of the Draft Field Operations Plan.

12 5. Well Field Design Analysis Report. The report shall

13 incorporate at a minimum:

14 a. a summary of data collected since the effective

15 date of the Consent Decree

16 b. a compilation of data used to design the

17 well field

18 c. a description of methods used to analyze the

19 data

20 d. results of the analyses

21 e. input used in model calibration and execution

22 6. Final Well Field Design. The Final Well Field

23 Design shall consist of bid-ready construction drawings, details,

24 and specifications. The Final Well Field Design shall include a

25 well field monitoring plan. The Final Well Field Design shall

26 address all EPA comments resulting from review of the Well Field

27 Data Analysis Report.

- 1 7. Plant, Piping and Equipment (PPE) 30% Design. The
2 PPE 30% Design shall include but not be limited to, the follow-
3 ing:
- 4 a. schematic plans and details of the well field
 - 5 piping and treatment plant showing all major
 - 6 components
 - 7 b. preliminary piping and instrument diagram (P&ID)
 - 8 for the treatment plant
 - 9 c. equipment design data
 - 10 d. a reporting of design analysis at 90% of comple-
 - 11 tion
- 12 8. PPE 70% Design. The PPE 70% Design shall incor-
- 13 porate at a minimum:
- 14 a. EPA comments resulting from review of PPE 30%
 - 15 design.
 - 16 b. plans and details that are 80% - 90% complete
 - 17 c. P&ID that are 80% - 90% complete
 - 18 d. electrical plans that are 50% complete
 - 19 e. instrumentation drawings that are 30% complete
 - 20 f. draft specifications
 - 21 g. procurement and installation QA/QC procedures
 - 22 outline
 - 23 h. complete design analysis
- 24 9. PPE Final Design. The PPE Final Design shall con-
- 25 sist of bid-ready construction drawings, details, and specifica-
- 26 tions. The PPE Final Design shall address all EPA comments
- 27 resulting from review of the PPE 70% Design.

- 1 10. Draft Start-Up Plan. The Draft Start-Up Plan shall
2 consist of:
- 3 a. a Start-up O & M Manual which shall consist of:
- 4 1) start-up operation strategy
- 5 2) preparation for Start-up
- 6 3) description of operations
- 7 4) emergency shut-down sequence and procedures
- 8 5) equipment maintenance procedures and
- 9 schedules
- 10 b. a Start-up Sampling Plan which shall consist of:
- 11 1) sample points for plant (influent, effluent
- 12 and air emissions) and well field
- 13 2) sampling frequency
- 14 3) parameters to be analyzed
- 15 11. Final Start-up Plan. The Final Start-up Plan shall
- 16 address all EPA comments resulting from review of the Draft
- 17 Start-up Plan.
- 18 12. Start-up Date. Settling Parties shall commence
- 19 operation of the groundwater extraction and treatment system for
- 20 the purposes of "shakedown" and of calibrating and testing the
- 21 system. Settling Parties shall provide EPA with written cer-
- 22 tification that operation of the system has commenced.
- 23 13. Draft Routine Operating Plan. The Draft Routine
- 24 Operating Plan shall consist of:
- 25 a. an O & M Manual, which shall consist of:
- 26 1) routine operation strategy
- 27 2) preparation for routine operation

- 1 3) description of operation
- 2 4) emergency shut-down sequence and procedures
- 3 5) equipment maintenance procedures and
- 4 schedules

5 b. a Sampling Plan, which shall consist of:

- 6 1) sample points for plant (influent, effluent
- 7 and air emissions) and well field
- 8 2) sampling frequency
- 9 3) parameters to be analyzed

10 As-built drawings, details and specifications shall also be sub-
11 mitted with the Draft Routine Operating Plan.

12 14. Final Routine Operating Plan. The Final Routine
13 Operating Plan shall address all EPA comments resulting from
14 review of the Draft Routine Operating Plan.

15 15. Official Start Date. Settling Parties shall com-
16 mence operation of the groundwater extraction and treatment sys-
17 tem for the purpose of remediating groundwater contamination.
18 Settling Parties shall provide EPA written certification of the
19 date of the Official Start. From and after the Official Start
20 Date, Settling Parties shall be required to attain and maintain
21 all of the performance objectives set forth in Section V
22 ("Obligations for the Remedial Action").

23 E. Schedule

24 The appropriate Settling Party(ies) shall submit all
25 deliverables to EPA in accordance with the schedule set forth
26 below. Any deliverable sent by mail shall be postmarked no later
27 than the date due.

<u>1</u>	<u>Deliverable</u>	<u>Due</u>
2	1. Periodic Progress Reports	See Section VII.D.1.
3	2. Annual Quality Assurance Reports	By January 31st of each year
4	3. Draft Field Operations Plan	Has been submitted pursuant to EPA Order 89-03
5	4. Final Field Operations Plan	Has been submitted pursuant to EPA Order 89-03
6	5. Well Field Design Analysis Report	Has been submitted pursuant to EPA Order 89-03
7	6. Final Well Field Design	Within 39 working days of EPA approval of the Well Field Design Analysis Report or within 199 working days of CD effective date, whichever is later
8	7. PPE 30% Design	Within 30 working days of EPA approval of the Final Well-field Design or within 259 working days of CD effective date, whichever is later
9	8. PPE 70% Design	Within 50 working days of EPA approval of the PPE 30% Design or within 324 working days of CD effective date, whichever is later
10	9. PPE Final Design	Within 50 working days of EPA approval of the 70% PPE Design or within 389 working days of CD effective date, whichever is later
11	10. Draft Start-up Plan	Within 215 working days of EPA approval of the Final PPE Design or within 614 working days of CD effective date, whichever is later
12	11. Final Start-up Plan	Within 20 working days of EPA approval of the Draft Start-up Plan or within 654 working days of CD effective date, whichever is later
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- 1 12. Start-up Date Within 300 working days of EPA
2 approval of the Final PPE
3 Design or within 699 working
4 days of CD effective date,
5 13. Draft Routine Operating Within 170 working days of the
6 Plan Start-up Date or within 869
7 working days of CD effective
8 14. Final Routine Operating Within 20 working days of EPA
9 Plan approval of the Draft Routine
10 Operating Plan or within 909
11 15. Official Start Date Within 245 working days of the
12 Start-up Date (written
certification to follow within
5 additional working days)

13 F. Any final reports, plans, specifications (including dis-
14 charge or emission limits), schedules, appendices, and attach-
15 ments required by this Decree are, upon approval by EPA, incor-
16 porated into this Decree. Any noncompliance with such EPA ap-
17 proved reports, plans, specifications (including discharge or
18 emission limits), schedules, appendices, and attachments shall be
19 considered a violation of this Decree.

20 G. Approvals/Disapprovals

21 1. EPA shall use its best efforts to review and comment
22 on submitted documents in a timely manner. If EPA disapproves
23 any deliverable (other than periodic progress reports, which are
24 covered by Subparagraph VII.D.1 above), the Settling Parties
25 shall have 10 working days from the receipt of such disapproval
26 to correct any deficiencies and resubmit the plan, report, or
27 item for EPA approval.

1 2. Any disapproval by EPA shall be in writing and shall
2 include a written explanation of why the plan, report, or item is
3 being disapproved.

4 3. The Settling Parties must address each of EPA's com-
5 ments and resubmit to EPA the previously disapproved plan,
6 report, or item with the required changes within the deadline set
7 forth in Subparagraph VII.G.1 above.

8

9 VIII. STIPULATED PENALTIES

10 A. General Provisions

11 1. Unless excused by EPA or a force majeure event, the
12 appropriate Settling Parties shall pay the stipulated penalties
13 set forth below for any violations of this Consent Decree.

14 2. Except as provided in Subparagraph VIII.D, stipu-
15 lated penalties for failure to perform any requirement of this
16 Consent Decree for which a deadline is specified shall begin to
17 accrue on the first day after the deadline. Stipulated penalties
18 for any other violation of this Consent Decree shall begin to ac-
19 crue on the first day after the Settling Party or Parties
20 receives written notice from EPA of such violations.

21 3. Stipulated penalties under this Section shall be
22 paid, by United States Treasury certified or cashiers check, to
23 the Hazardous Substance Superfund and shall be paid by the 15th
24 day of the month following the month in which the violation oc-
25 curred. A copy of the check and the letter forwarding the check,
26 including a brief description of the alleged noncompliance, shall
27 be submitted to the EPA in accordance with Section XIX.

1 4. Notwithstanding the stipulated penalties provisions
2 of this Section, and to the extent authorized by law, EPA may
3 elect to assess civil penalties or bring an action in District
4 Court to enforce the provisions of this Decree. Payment of
5 stipulated penalties shall not preclude EPA from electing to
6 pursue any other remedy or sanction to enforce this Decree, and
7 nothing shall preclude EPA from seeking statutory penalties
8 against the Settling Parties for violations of statutory or
9 regulatory requirements relating to the performance of the
10 Remedial Action, provided that the total shall not exceed \$25,000
11 per day per violation.

12 5. Any determination of non-compliance with which the
13 Settling Parties disagree shall be deemed a dispute and subject
14 to the provisions of Section IX ("Dispute Resolution").

15 B. Periodic Progress Reports and Annual Quality Assurance
16 Reports

17 1. The City shall pay stipulated penalties of \$1000 per
18 day for the submission of a late or deficient Periodic Progress
19 Report.

20 2. The City shall pay stipulated penalties of \$1000 per
21 day for the submission of a late or deficient Annual Quality As-
22 surance Report or for failure to submit an Annual Quality As-
23 surance Report.

1 C. Work to Be Performed and All Other Deliverables

2 1. Except for the stipulated penalties specified in
3 Paragraph VIII.B above, the Settling Parties shall pay the fol-
4 lowing stipulated penalties for each failure to comply with the
5 requirements of this Decree, including but not limited to all im-
6 plementation schedules and performance and submission dates:

7
8 a. Class I Requirements

9
10 Draft Field Operations Plan
11 Well Field Design Analysis Report
12 PPE 30% Design
13 PPE Final Design
14 Draft Start-up Plan
15 Start-up Date
16 Final Routine Operating Plan

13	<u>Period of Failure to Comply</u>	<u>Penalty Per Violation Per Day</u>
14	1st through 14th calendar day	\$ 3,000
15	15th through 30th calendar day	7,000
16	31st calendar day and beyond	15,000

17
18 b. Class II Requirements

19 Final Field Operations Plan
20 Final Well Field Design
21 PPE 70% Design
22 Final Start-up Plan
23 Draft Routine Operating Plan
24 Official Start Date

22	<u>Period of Failure to Comply</u>	<u>Penalty Per Violation Per Day</u>
23	1st through 14th calendar day	\$ 5,000
24	15th through 30th calendar day	12,000
25	31st calendar day and beyond	25,000

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2 D. Cash Payments

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4 1. If MDC fails to make its payment to the Trust Fund
5 pursuant to Subparagraph VI.B.2 of this Consent Decree, MDC shall
6 pay a stipulated penalty of \$5000 per day of non-compliance.

6

7 2. If the USAF fails to make its initial payment of
8 \$2,500,000 to the Trust Fund pursuant to Subparagraph VI.B.3 of
9 this Consent Decree, only the USAF shall pay a stipulated penalty
10 of \$5000 per day of non-compliance, provided however, that if
11 this obligation, such payment, or expenditure of funds would have
12 resulted in the violation of the "Anti-Deficiency Act", then such
13 failure shall not result in the imposition of stipulated
14 penalties against the USAF.

14

15 3. If the USAF fails to make a required payment after
16 the initial \$2,500,000 has been paid to the Trust Fund pursuant
17 to Subparagraph VI.B.3 and Hughes fails to cure the USAF's
18 failure to the extent provided in Subparagraph VI.B.8, the USAF
19 and Hughes shall both be liable for a single stipulated penalty
20 of \$5000 per day for each day beginning on the 61st day of the
21 quarter in which the Trustee requested payment, provided,
22 however, that if this obligation, such payment, or expenditure of
23 funds would have resulted in the violation of the "Anti-
24 Deficiency Act", then such failure shall not result in the im-
25 position of stipulated penalties against the USAF.

25

26 4. If the TAA fails to make a payment to the Trust Fund
27 pursuant to Subparagraph VI.B.4 and the City fails to cure the
TAA's failure pursuant to Subparagraph VI.B.7, the TAA and the

1 City shall both be liable for a single stipulated penalty of
2 \$5000 per day beginning on the 61st day of the quarter in which
3 the Trustee requested payment.

4 E. If the time-weighted average concentration of TCE in the
5 treated water to be computed pursuant to Appendix B is greater
6 than 1.5 ppb, the groundwater treatment facility shall be con-
7 sidered to have been out of compliance for the 90 days of opera-
8 tion for which the time-weighted average was computed. The City
9 of Tucson shall be subject to stipulated penalties in the amount
10 of \$2500 per day for each day during any such period of non-
11 compliance for which the representative treated water sample for
12 that day indicates the concentration of TCE was greater than 1.5
13 ppb.

14 F. For failure to comply with any requirements of this Con-
15 sent Decree not specified in paragraphs B, C, D or E above, Set-
16 tling Parties shall be liable for stipulated penalties set forth
17 for a Class I deliverable.

18

19 IX. DISPUTE RESOLUTION

20 A. In the event that the Parties cannot resolve a dispute
21 arising under this Decree, the interpretation advanced by EPA
22 shall be considered binding unless one or more Settling Parties
23 or the USAF invoke the dispute resolution provisions of this Sec-
24 tion.

25 B. If any Settling Party or the USAF disagrees with any EPA
26 notice of disapproval, determination of violation, or other deci-
27 sion made pursuant to this Consent Decree, or if EPA and the Set-

1 tling Party otherwise reach an impasse with regard to the re-
2 quirements of this Consent Decree, the Settling Party or the USAF
3 shall provide EPA with written notice within seven (7) calendar
4 days after its receipt of written notice of the disapproval,
5 determination of violation, or other decision made pursuant to
6 this Decree that is in dispute, except as otherwise provided for
7 in this Decree. Such written notice shall set forth in summary
8 fashion the nature of the dispute. Failure to provide EPA with
9 notification of the dispute in accordance with this Paragraph
10 IX.B shall constitute a waiver of the Settling Party's or the
11 USAF's ability to raise the dispute, provided, however, that
12 this Paragraph IX.B shall not apply in the case of disputes pur-
13 suant to Subparagraphs XIX.B.4 and XIX.C.2 of this Decree.

14 C. Any Dispute that arises under this Consent Decree shall
15 in the first instance be the subject of informal negotiations be-
16 tween EPA and the Settling Party or the USAF. Such period of in-
17 formal negotiations shall not extend beyond fifteen (15) calendar
18 days after EPA's receipt of written notice of the dispute, unless
19 the EPA and the Settling Party agree otherwise. Such informal
20 negotiations shall be terminated with a written decision, deter-
21 mination or memorandum ("Decision") from the EPA Regional Ad-
22 ministrator or his delegate served upon the Settling Parties
23 identified in Section XX ("Form of Notice").

24 D. At the termination of unsuccessful informal nego-
25 tiations, should a Settling Party (excluding the USAF) disagree
26 with EPA's Decision, it may seek review of the Decision in accor-
27 dance with the following procedures:

1 1. Within fifteen (15) days after its receipt of the
2 EPA's Decision, the Settling Party shall file with the Court a
3 petition, which shall describe the nature of the dispute, present
4 the issues to be reviewed and propose a resolution. Such peti-
5 tion shall not be filed prior to the termination of informal ne-
6 gotiations. Failure to file a petition within 15 days shall con-
7 stitute a waiver of the Settling Party's right to challenge EPA's
8 Decision.

9 2. EPA shall have thirty (30) days after its receipt
10 of such petition filed by the Settling Party (excluding the USAF)
11 to respond thereto.

12 E. In resolving any dispute pursuant to Paragraph IX.D
13 relating to the selection, technique, or adequacy of any aspect
14 of the Remedial Action and in any other dispute subject to CERCLA
15 §113(j)(2), 42 U.S.C. §9613(j)(2), the Court shall uphold EPA's
16 Decision unless the Settling Party(ies) can demonstrate, on the
17 administrative record, that EPA's Decision was arbitrary and
18 capricious or otherwise not in accordance with law. In any dis-
19 pute concerning the existence of a force majeure event (Section
20 X), the Settling Party(ies) shall have the burden of demonstrat-
21 ing that the delay or anticipated delay has been or will be
22 caused by events beyond the control of the Settling Party(ies),
23 and that the duration of the delay is or was warranted under the
24 circumstances. In any dispute, other than those specified above,
25 the Court shall determine the appropriate standard and scope of
26 judicial review. In any proceedings on a dispute, the Settling
27 Party(ies) shall bear the burden of proof.

1 F. At the termination of unsuccessful informal nego-
2 tiations, should the USAF disagree with EPA's Decision, it may
3 seek review of that Decision in accordance with the following
4 procedures:

5 1. Within fifteen (15) days of receipt of the EPA's
6 Decision, the USAF shall file a written notice of the dispute
7 with the EPA Administrator. Failure of the USAF to file a peti-
8 tion with the EPA Administrator shall constitute USAF acceptance
9 of the Regional Administrator's Decision.

10 2. The EPA Administrator or his Deputy (the
11 "Administrator") shall have sixty (60) days after his receipt of
12 the petition of the USAF to respond thereto. Upon request, and
13 prior to resolving the dispute, the Administrator shall meet and
14 confer with the USAF's Secretarial Representative(s) concerning
15 the issues of the dispute.

16 3. Upon resolution of the dispute, the Administrator
17 shall provide the USAF with a written Final Decision setting
18 forth such resolution. The duties of the Administrator pursuant
19 to this Section shall not be delegated.

20 G. In the event that the USAF and another Settling Party
21 seek review of the same or a related EPA Decision, the USAF dis-
22 pute proceedings will be stayed until such time as the Court has
23 issued its decision on the disputed matters. In such event, the
24 Administrator shall adopt the decision of the Court and apply it,
25 as appropriate, to the USAF.

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1 H. Invocation of Dispute Resolution shall not (1) postpone
2 the deadlines for the Settling Parties or the USAF to meet their
3 obligations under this Decree with respect to the disputed issue,
4 (2) relieve the Settling Parties or the USAF from the timely per-
5 formance of activities not subject to dispute unless such perfor-
6 mance would be impracticable pending resolution of the dispute,
7 or (3) relieve any Settling Party or the USAF from liability for
8 stipulated penalties pursuant to Section VIII ("Stipulated
9 Penalties") for its failure to meet any requirements for which it
10 is liable pursuant to Section V ("Obligations for the Remedial
11 Action"), Section VI (Specific Obligations of the Settling
12 Parties") or Section VII ("Work to Be Performed"), except the EPA
13 will not demand penalties until the dispute is resolved.

14 I. If the Court (or in the case of USAF, the Administrator)
15 finds that the Settling Party has satisfied its burden and there-
16 fore is the prevailing party in the dispute, then the Settling
17 Party or the USAF shall pay no stipulated penalties for failing
18 to timely perform the disputed actions. If the Court finds that
19 the Settling Party has not satisfied its burden, the Settling
20 Party shall transmit payment of all penalties which have accrued
21 during the dispute, plus interest at the rate specified in Sec-
22 tion 107(a) of CERCLA, 42 U.S.C. §9607(a), to the Hazardous Sub-
23 stance Superfund within 15 working days of resolution of the dis-
24 pute. Provided, however, that if the Court (or in the case of
25 the USAF, the Administrator) finds that the Settling Party raised
26 and pursued its dispute in good faith, the Court (or the Ad-

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1 ministrator) may reduce by a maximum of fifty percent (50%) the
2 amount of any stipulated penalties that accrued during the dis-
3 pute.

4 J. Nothing in this section shall be construed to limit the
5 right of a Settling Party to initiate and prosecute an action
6 against another Settling Party for breach of this Consent Decree
7 or to otherwise limit any right which any Settling Party has or
8 may have against another Settling Party.

10 X. FORCE MAJEURE

11 The Settling Parties and the USAF shall perform all the re-
12 quirements of this Consent Decree according to the time limits
13 set out in the Consent Decree unless their performance is
14 prevented or delayed by events which constitute a force majeure.

15 For the purpose of this Decree, a force majeure is defined
16 as any event arising from causes beyond the control of the Set-
17 tling Parties or the USAF and their contractors, subcontractors
18 or consultants which delays or prevents performance. Neither
19 economic hardship nor increased costs shall be considered an
20 event beyond the control of the Settling Parties or the USAF,
21 their contractors, subcontractors or consultants and shall not
22 trigger the force majeure clause. A force majeure may include
23 but is not limited to the following circumstances:

1 1. acts of God, fires, natural disasters, riots, wars, un-
2 avoidable and unforeseeable labor strikes, adverse weather condi-
3 tions, unforeseeable inability to obtain licenses as required by
4 Title 45, Arizona Revised Statutes despite timely application,
5 and emergency conditions requiring work stoppage;

6 2. any delay caused by changes in the requirements of this
7 Consent Decree or revisions or amendments to EPA guidance or the
8 NCP;

9 3. any other cause beyond the control of the Settling
10 Parties or the USAF provided, however, that increases in the cost
11 of performance of the Remedial Action or change in economic cir-
12 cumstances shall not excuse such performance nor affect the ap-
13 plicability of the penalty provision and/or other sanctions which
14 are provided for under this Decree.

15 In the event of a force majeure, the time for performance of
16 the activity delayed by the force majeure shall be extended for
17 the minimum time necessary to allow completion of the delayed ac-
18 tivity but in no event longer than the time period of the delay
19 attributable to the force majeure. The time for performance of
20 any activity which is dependent on the prior completion of the
21 delayed activity shall be similarly extended. EPA shall deter-
22 mine whether requirements are to be delayed and the time period
23 granted for any delay. The Settling Parties and the USAF shall
24 adopt all practicable measures to avoid or minimize any delay
25 caused by a force majeure.

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1 In the event the Settling Parties and the USAF discover a
2 force majeure, the Settling Parties or the USAF shall orally
3 notify EPA's Project Coordinator immediately (no later than 48
4 hours after the Settling Parties become aware of the occurrence
5 of the force majeure) and shall notify EPA in writing, no later
6 than seven (7) calendar days after discovery of a force majeure,
7 of the anticipated length and cause of the delay. The EPA shall
8 determine whether the event constitutes a force majeure. In the
9 event that EPA and the Settling Parties or the USAF cannot agree
10 that any delay has been or will be caused by a force majeure
11 event, or on the appropriate length of the delay, the dispute
12 shall be resolved in accordance with Section IX ("Dispute
13 Resolution").
14

15 XI. WORKER HEALTH AND SAFETY PLAN

16 The Worker Health and Safety Plans that the Settling Parties
17 will submit pursuant to Section VII of this Decree shall satisfy
18 the requirements of 29 CFR Part 1910.120 and EPA's Standard
19 Operating Safety Guides.
20

21 XII. QUALITY ASSURANCE/QUALITY CONTROL

22 A. All QA/QC Plans should, where applicable, be prepared in
23 accordance with current EPA guidance, Interim Guidelines and
24 Specifications for Preparing Quality Assurance Project Plans,
25 QAMS-005/80.
26
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1 B. The Settling Parties shall use QA/QC procedures in ac-
2 cordance with the QA/QC plans submitted pursuant to this Decree,
3 and shall utilize standard EPA chain of custody procedures, as
4 documented in National Enforcement Investigations Center Policies
5 and Procedures Manual as revised in May 1986 for all sample col-
6 lection and analysis activities. In order to provide quality as-
7 surance and maintain quality control regarding all samples col-
8 lected pursuant to this Decree, Settling Parties shall:

9 1. Ensure that all contracts with laboratories utilized
10 by the Settling Parties for analysis of samples taken pursuant to
11 this Consent Decree provide for reasonable access of EPA person-
12 nel and EPA authorized representatives to assure the accuracy of
13 laboratory results obtained pursuant to this Consent Decree.

14 2. Ensure that laboratories utilized by the Settling
15 Parties for analysis of samples taken pursuant to this Consent
16 Decree perform all analyses in accordance with the EPA approved
17 QA/QC plan.

18 3. Ensure that all laboratories utilized by the Set-
19 tling Parties for analysis of samples taken pursuant to this
20 Decree demonstrate compliance with the EPA approved QA/QC plan.
21 As part of the QA/QC demonstration and upon request by EPA, such
22 laboratories shall perform, at their expense, analyses of samples
23 provided by EPA to demonstrate the quality of each laboratory's
24 data. EPA may provide to each laboratory a maximum of four
25 samples per year per analytical combination (e.g., four aqueous
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1 samples for analysis by gas chromatography/mass spectrometry,
2 four soil/sediment samples for analysis by gas
3 chromatography/mass spectrometry).
4

5 XIII. PROJECT COORDINATOR

6 A. By the effective date of this Consent Decree, the Set-
7 tling Parties collectively and EPA shall each designate Project
8 Coordinators to monitor the progress of the Remedial Action and
9 to coordinate communication between EPA and the Settling Parties.
10 The EPA Project Coordinator shall have the authority vested in
11 the On-Scene Coordinator by 40 C.F.R. § 300 et seq., 50 Fed. Reg.
12 47912 (Nov. 20, 1985), including such authority as may be added
13 by amendments to 40 C.F.R. § 300. The EPA Project Coordinator
14 shall also have the authority to suspend the performance of the
15 Remedial Action or any other activity at the Site that, in the
16 opinion of the EPA Project Coordinator, may present or contribute
17 to an imminent and substantial endangerment to public health,
18 welfare, or the environment. In the event the EPA Project Coor-
19 dinator suspends the Remedial Action or any other activity at the
20 Site, the Parties, shall, if necessary, extend the compliance
21 schedule of this Consent Decree as appropriate for the minimum
22 period of time necessary to perform the Remedial Action. Should
23 the Settling Parties desire to extend the compliance schedule
24 pursuant to this paragraph, the Settling Parties shall propose,
25 and EPA shall determine, the length of any extension. A dis-
26 agreement over the length of such an extension is a dispute to be
27 resolved through Dispute Resolution. If the EPA Project Coor-

1 dinator suspends the Remedial Action pursuant to this paragraph
2 due to the acts or omissions of the Settling Parties or the
3 Contractor(s) which constitute a violation of the Consent Decree,
4 Settling Parties shall be liable for stipulated penalties in ac-
5 cordance with Section VIII and any extension of the compliance
6 schedule shall be at EPA's discretion, subject to Dispute Resolu-
7 tion procedures if invoked by the Settling Parties. The Project
8 Coordinators do not have the authority to modify in any sig-
9 nificant way the terms of this Decree, including Appendix A or
10 any design or construction plans. The absence of the EPA Project
11 Coordinator from the Site shall not be cause for stoppage of the
12 work. EPA and the Settling Parties may change their respective
13 Project Coordinators by notifying the other party in writing at
14 least seven calendar days prior to the change.

15 B. The Settling Parties' Project Coordinator may assign a
16 representative, including a contractor, to serve as a Site repre-
17 sentative for oversight of performance of daily operations during
18 remedial activities.

19 C. The EPA Project Coordinator may assign a representative,
20 including an EPA employee or contractor, to serve as a Site rep-
21 resentative for oversight of performance of daily operations
22 during remedial activities. Such representatives do not have the
23 powers of the Project Coordinator to suspend the performance of
24 the Remedial Action or any other activity at the Site.

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1 property owned or controlled by the Settling Parties for purposes
2 of conducting any activity authorized by this Decree, including
3 but not limited to:

- 4 1. Monitoring the progress of activities taking
5 place;
- 6 2. Verifying any data or information submitted to
7 EPA;
- 8 3. Conducting investigations relating to contami-
9 nation at or near the Site;
- 10 4. Obtaining samples at the Site; and
- 11 5. Inspecting and copying records, operating logs,
12 contracts or other documents utilized to assess
13 Settling Parties compliance with the Decree, except
14 as provided by the provisions of Paragraph XVI.E
15 herein.

16 C. EPA shall provide to the Settling Parties' Project Coor-
17 dinator the analytical results obtained from any sampling or
18 monitoring conducted pursuant to this Consent Decree.

19 D. Any person obtaining access pursuant to this provision
20 shall comply with all applicable provisions of the Worker Health
21 and Safety Plan as submitted in the work plans required by this
22 Decree and reviewed by EPA.

23 E. The provisions of this Section ("Site Access") shall be
24 in addition to, and not in lieu of, any right of access available
25 to EPA under applicable law.

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1 XV. COMPLIANCE WITH APPLICABLE LAWS AND REGULATIONS

2 A. All activities undertaken by the Settling Parties pur-
3 suant to this Consent Decree shall be undertaken in accordance
4 with the requirements of all applicable local, state and federal
5 laws, regulations, and all "applicable" or "relevant and ap-
6 propriate" federal and state environmental requirements as iden-
7 tified by EPA pursuant to CERCLA Section 121(d) and shall be con-
8 sistent with the NCP and Appendix A to this Consent Decree.

9 B. Pursuant to CERCLA, EPA has determined that no federal,
10 state, or local permits are necessary for the onsite work con-
11 ducted pursuant to this Consent Decree, provided, however, that
12 this does not apply to any licenses as required by Title 45,
13 Arizona Revised Statutes.

14 C. EPA has determined that the obligations and procedures
15 required under this Consent Decree are consistent with its
16 authority under applicable law.

17

18 XVI. SUBMISSION OF DOCUMENTS, SAMPLING, AND ANALYSIS

19 A. Except as otherwise provided in this Consent Decree, any
20 analytical or design data generated or obtained by the Settling
21 Parties pursuant to this Consent Decree shall be provided to EPA
22 within seven days of any written request by EPA if such data are
23 in the possession of the Settling Parties at the time of EPA's
24 request and as soon as possible thereafter if such data are not
25 in Settling Parties possession at the time of EPA's request.

26 B. EPA employees and EPA's authorized representatives

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1 shall have the right to take splits of any samples obtained by
2 the Settling Parties or anyone acting on Settling Parties' behalf
3 pursuant to this Consent Decree.

4 C. Settling Parties shall notify EPA of all sampling con-
5 ducted pursuant to this Consent Decree.

6 1. Schedules for routine sampling events shall be in-
7 cluded with the relevant deliverables pursuant to Section VII
8 ("Work to be Performed").

9 2. For any deviations from, including additions to,
10 sampling schedules developed pursuant to Section VII ("Work to be
11 Performed") which occur during design, construction, and the
12 Start-up Period, the City shall notify EPA fourteen (14) calendar
13 days in advance of the revised sampling event.

14 3. For any deviations from, including additions to,
15 sampling schedules developed pursuant to Section VII ("Work to be
16 Performed") which occur after the Start-up Period, the City shall
17 notify EPA seven (7) calendar days in advance of the revised sam-
18 pling event.

19 4. In the event that unexpected conditions preclude
20 notification pursuant to Subparagraphs XVI.D.2. or XVI.D.3.
21 above, the City shall obtain verbal approval from the EPA Project
22 Coordinator in advance of any deviations from applicable sampling
23 schedules. Within 72 hours of such deviations, the City shall
24 submit to EPA in writing a detailed description of the unexpected
25 conditions that it believes warranted the deviations and a
26 detailed description of the deviations themselves.

27

1 D. All data, factual information, and documents submitted
2 to or obtained by EPA pursuant to this Consent Decree shall be
3 subject to public inspection at EPA offices. The parties ex-
4 plicitly recognize that the provisions of §104(e)(7)(F) of CERCLA
5 apply to such data and information generated by the Settling
6 Parties. Settling Parties reserve their rights to assert a con-
7 fidentiality claim for all other information pursuant to Title 18
8 U.S.C. §1905 and 40 C.F.R. Part 2, and any applicable state laws
9 and regulations. The provisions of this Section shall not con-
10 stitute a waiver of any applicable claims of attorney work
11 product or attorney client or other legal privilege.

12 E. Except as provided in EPA approved QA/QC plans as
13 developed pursuant to Section VII ("Work to be Performed"), Set-
14 tling Parties shall notify EPA at least thirty 30 days prior to
15 disposing of any sample taken or analyzed pursuant to this Con-
16 sent Decree and shall allow EPA the opportunity to take posses-
17 sion of such sample.

18 F. The Settling Parties agree that EPA's ability to obtain
19 information or data pursuant to this Section ("Submission of
20 Documents, Sampling, and Analysis") is in addition to, and not in
21 lieu of, its information gathering abilities under applicable
22 law.

23

24 XVII. RETENTION OF RECORDS

25 A. The Settling Parties shall preserve and retain and shall
26 instruct their contractors, subcontractors and anyone else acting
27 on their behalf to preserve and retain all records and documents

1 (in the form of originals or exact copies, or in the alternative,
2 micrographic or electronic data storage of all originals)
3 developed in the course of performing and as part of the Remedial
4 Action and which are in their possession or control that relate
5 in any manner to the Site, regardless of any document retention
6 policy to the contrary, for six years after the completion of the
7 Remedial Action or termination of this Consent Decree, whichever
8 is later. However, at any time during this six year period, the
9 Settling Parties may deliver to the EPA Project Coordinator
10 originals or copies of all records and documents that have been
11 preserved and retained under this Section and thereby absolve
12 themselves of further responsibilities to preserve and retain
13 those documents delivered to EPA. The requirement for preserva-
14 tion and retention of records and documents shall not apply to
15 drafts (other than those referred to by name in this Decree), in-
16 cluding any handwritten notes or comments of a Settling Party, or
17 phone message slips, except any such draft or phone message slip
18 that contains data relevant to the Remedial Action that is not
19 otherwise being preserved under this Decree. Nothing in this
20 Paragraph may be construed as a waiver of any claims of confiden-
21 tiality or privilege.

22 B. Upon the termination of the six year period set forth in
23 Paragraph XVII.A, the Settling Parties shall deliver originals or
24 copies of all records and documents preserved under Paragraph
25 XVII.A to EPA if they have not already done so pursuant to
26 Paragraph XVII.A.

27

1 XVIII. RESPONSE AUTHORITY

2 Nothing herein shall be deemed to limit the response
3 authority of EPA under Section 104 of CERCLA, 42 U.S.C. § 9604,
4 and under Section 106 of CERCLA, 42 U.S.C. § 9606, or under any
5 other federal response authority. This Section may not be used
6 to amend the Remedial Action except as authorized by CERCLA.

7
8 XIX. REIMBURSEMENT OF COSTS

9 A. Response Costs

10 TAA and USAF shall each pay to the Hazardous Substance
11 Superfund one-half of the amount of Two Million, Three Hundred
12 Thirty-Three Thousand, Five Hundred Dollars (\$2,333,500), plus
13 interest as specified below, which shall be accepted by EPA as a
14 complete settlement and compromise with the Settling Parties of
15 all Response Costs associated with the Tucson International Air-
16 port Area Superfund Site up to September 30, 1988. USAF shall
17 make one payment of One Million, One Hundred Sixty-Six Thousand,
18 Seven Hundred and Fifty Dollars (\$1,166,750) within ninety (90)
19 days of the effective date of this Consent Decree and, with
20 timely payment, shall not be liable for payment of the interest
21 that has accrued on the amount of such payment. TAA shall pay
22 the remaining One Million, One Hundred Sixty-Six Thousand, Seven
23 Hundred and Fifty Dollars (\$1,166,750) in five equal annual in-
24 stallments, plus interest accrued on any unpaid balance, with the
25 first payment due within one calendar year of the effective date.
26 Interest on the \$2,333,500 shall be calculated at the rate
27 specified at 42 U.S.C. §9607 and shall begin to accrue on the ef-

1 fective date of this Consent Decree. Either TAA or USAF may at
2 any time prior to the expiration of the payment schedule provided
3 herein remit to the Hazardous Substances Superfund the balance of
4 any sums owed by such party (with interest as calculated above)
5 without penalty.

6 Notwithstanding the foregoing, EPA reserves the right to
7 seek reimbursement only from the USAF for (1) costs in the
8 amount of Two Hundred Thousand Dollars (\$200,000) incurred by EPA
9 in overseeing Installation Restoration Program activities at Air
10 Force Plant #44 prior to October 1, 1988, and in amounts incurred
11 by EPA thereafter and continuing to be incurred by EPA for
12 overseeing Installation Restoration Program activities at Air
13 Force Plant #44, and (2) any costs related to Area B. Settlement
14 of these costs as to the USAF is not agreed to in this Consent
15 Decree.

16 B. Interim Payments of Oversight Costs

17 1. Within sixty (60) days of the end of each calendar
18 quarter, EPA shall submit to the Settling Parties except MDC an
19 accounting of all Oversight Costs incurred during that quarter.
20 The accounting shall be based upon documentation compiled by
21 EPA's Region IX office, and shall include a copy of the ap-
22 propriate SPUR (Software Package for Unique Reports, EPA's Super-
23 fund accounting system document). The accounting shall include a
24 summary of EPA's direct costs, as well as indirect cost es-
25 timates. The quarterly accounting is for informational purposes
26 only, is not a demand for payment, shall not, in any way, bind
27

1 EPA or limit EPA's ability to obtain complete reimbursement of
2 all of its Oversight Costs, and is not a matter for dispute
3 resolution.

4 2. Within ninety (90) days of the end of each calendar
5 year, EPA shall submit to the Settling Parties except MDC an an-
6 nual accounting of all Oversight Costs expended during the calen-
7 dar year. The accounting shall include all documentation upon
8 which EPA bases its claim for reimbursement of Oversight Costs.
9 Failure to include all relevant Oversight Costs in any particular
10 annual accounting shall not preclude the EPA from seeking such
11 costs in any subsequent annual accounting, up to six (6) years
12 subsequent to EPA's incurrence of such Oversight Costs.

13 3. Unless EPA agrees, in writing, to a longer period
14 of time, the Trustee, on behalf of the Settling Parties, shall
15 reimburse EPA for all Oversight Costs set forth in EPA's annual
16 accounting within ninety (90) days of its receipt of such ac-
17 counting. Payment shall be made by United States Treasury Check
18 or certified check made payable to the Hazardous Substance Super-
19 fund. The payment shall specifically reference the identity of
20 the Site and be addressed to:

21

22 U.S. Environmental Protection Agency -- Region IX
23 Attn: Superfund Accounting
24 P.O. Box 360863M
25 Pittsburgh, PA 15251

26

27

28

1 A copy of the transmittal letter shall be sent to the EPA Project
2 Coordinator. Payments made pursuant to this paragraph shall not
3 constitute an admission by the Settling Parties of any liability
4 for payment of Oversight Costs nor preclude them from seeking
5 review of such costs as set forth in Subparagraph XIX.B.4 below.

6 4. Settling Parties reserve the right to contest,
7 through the Dispute Resolution process set out in Section IX,
8 that EPA's annual accounting includes claims for costs not ac-
9 tually incurred or incurred in a manner inconsistent with the
10 NCP. If the Settling Parties choose to raise any such dispute,
11 they must do so within one calendar year of EPA's original re-
12 quest for payment of such costs. Should it be determined in Dis-
13 pute Resolution that the Settling Parties have overpaid EPA Over-
14 sight Costs, the Settling Parties shall receive the amount over-
15 paid as a credit toward payment of Oversight Costs claimed by EPA
16 in a subsequent accounting.

17 C. Final Payment of Oversight Costs

18 1. Within one hundred and twenty (120) days of EPA's
19 approval of Settling Parties' Certification of Completion pur-
20 suant to Section XXXIII, EPA shall provide to the Settling
21 Parties a final accounting of all unreimbursed Oversight Costs
22 incurred by EPA pursuant to this Consent Decree. The final ac-
23 counting shall include documentation which supports EPA's claim
24 for reimbursement.

25 2. Within one hundred and twenty (120) days of receipt
26 of EPA's final accounting, the Trustee, on behalf of the Settling
27 Parties, shall either pay EPA all previously unreimbursed Over-

1 sight Costs, reduced by the amount of any previous overpayments,
2 set forth in the final accounting or invoke the Dispute Resolu-
3 tion mechanism to contest EPA's entitlement to such costs. In-
4 vocation of the Dispute Resolution mechanism shall toll Settling
5 Parties' obligation to make payment to EPA of any contested sums.
6 Within ten (10) days of the conclusion of the Dispute Resolution
7 process, the Trustee shall pay to EPA any sums owed. Payment of
8 such sums shall be made in accordance with Subparagraph B.3 of
9 this Section.

10 D. Access Costs

11 In the event EPA must obtain site access on behalf of
12 the Settling Parties, the Settling Parties shall reimburse EPA
13 for all costs (including attorneys fees) reasonably incurred.
14 Such reimbursement shall be made within thirty (30) days of EPA's
15 demand therefor.

16
17 XX. FORM OF NOTICE

18 When notification to or communication with the United
19 States, EPA, or the Settling Parties is required by the terms of
20 this Consent Decree, it shall be in writing, postage prepaid, and
21 addressed as follows:

22

23

As to the United States:

24

25

Chief
Environmental Enforcement Section
Land and Natural Resources Division
Department of Justice
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

26

27

1 As to EPA:
2 EPA Project Coordinator - TIAA Site
3 State Programs Section
4 U.S. Environmental Protection Agency
5 215 Fremont Street
6 San Francisco, CA 94105
7
8 As to the Settling Parties:
9
10 Michael K. Tubbs, Director
11 Tucson Water
12 310 West Alameda
13 P.O. Box 27210
14 Tucson, AZ 85726-7210
15
16 F. Thomas Jefferson
17 Project Coordinator
18 Tucson Water
19 310 West Alameda
20 P.O. Box 27210
21 Tucson, AZ 85726-7210
22
23 Walter A. Burg, General Manager
24 Tucson Airport Authority
25 7005 S. Plumer Avenue
26 Tucson, AZ 85706
27
28 Legal Counsel
29 Hughes Aircraft Company
30 Building 801, C2
31 P.O. Box 11337
32 Tucson, AZ 85734
33
34 AFRCE-WR
35 630 Sansome Street, Rm 1316
36 San Francisco, CA 94111-2278
37 Attention: Robert J. Clark
38 or J.D. McCubbin, Esq.
39
40 Dan R. Summers
41 Corporate Counsel
42 Environmental Health & Safety
43 McDonnell Douglas Corporation
44 Post Office Box 516
45 St. Louis, MO 63166
46
47

1 Any Party may substitute another name or address to which
2 notices must be sent to it by notifying all other Parties in
3 writing.

4
5 **XXI. MODIFICATION**

6 The Parties may agree to modify this Consent Decree in the
7 future to alter the respective obligations of one or more of the
8 Settling Parties in accordance with the provisions of Section
9 VI(g) of this Consent Decree (regarding the Final Settlement of
10 the obligations of the USAF) or for any other reason. There
11 shall be no modification of this Consent Decree without written
12 agreement of all of the Parties to this Decree and entry by the
13 Court, except that the agreement of any Party shall not be re-
14 quired with respect to any modification which does not affect its
15 rights or obligations under the Decree.

16
17 **XXII. ADMISSIBILITY OF DATA**

18 In the event that the Court is called upon to resolve a
19 dispute concerning implementation of this Consent Decree, the
20 Parties waive any evidentiary objection to the admissibility into
21 evidence of data gathered, generated, or evaluated pursuant to,
22 and in compliance with, this Decree.

23
24 **XXIII. RESERVATION OF RIGHTS**

25 A. Notwithstanding compliance with the terms of this Con-
26 sent Decree, including termination and satisfaction of the condi-
27 tions of this Consent Decree under the provisions of Section

1 XXXIII ("Termination and Satisfaction"), the Settling Parties are
2 not released from liability, for any claims other than Covered
3 Matters. Except as limited by Subparagraph VIII.A.4, EPA
4 reserves the right to take any enforcement action pursuant to
5 CERCLA and/or any other legal authority, including the right to
6 seek response costs, injunctive relief, monetary penalties, and
7 punitive damages for any civil or criminal violation of law or
8 this Consent Decree. Settling Parties reserve all defenses to
9 such EPA action.

10 B. The EPA expressly reserves all rights and defenses that
11 it may have, including its right both to disapprove of work per-
12 formed by Settling Parties and to request that Settling Parties
13 perform tasks in addition to those detailed in the Consent
14 Decree. Except as provided in Section V ("Obligations for the
15 Remedial Action"), the EPA reserves the right to undertake
16 removal actions and/or remedial actions at any time. The EPA
17 reserves its rights to seek reimbursement from the Settling
18 Parties for such costs incurred by the EPA.

19 C. By entering into and performing this Consent Decree, the
20 Settling Parties do not admit any liability. Except as provided
21 in Section II ("Jurisdiction"), Section III ("Binding Effect"),
22 Section XXVI ("Claims Against the Fund"), and Section IV
23 ("Purpose"), the Parties reserve all legal and equitable rights
24 and defenses they may have with respect to any actions concerning
25 the Site or Consent Decree or any other matter.

26

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1 D. The terms of this Consent Decree are mutually enforce-
2 able by the Settling Parties, and, except as expressly provided
3 elsewhere in this Consent Decree, each Settling Party reserves
4 any and all rights that it has or may have against another Set-
5 tling Party.

6
7 XXIV. COVENANT NOT TO SUE

8 A. Except as provided herein, while in compliance with and
9 upon termination and satisfaction of the conditions of this Con-
10 sent Decree under the provisions of Section XXXIII ("Termination
11 and Satisfaction"), by a Settling Party other than MDC or, in the
12 case of MDC, upon fulfillment of its obligation to make a payment
13 in the amount of \$500,000 into the Trust Fund pursuant to Section
14 VI ("Specific Obligations of the Settling Parties"), the EPA
15 covenants not to sue such Settling Party with regard to Covered
16 Matters. Such covenant not to sue shall remain in effect with
17 respect to such Settling Party without regard to whether any
18 other Settling Party fulfills its obligations under this Decree.
19 This Section is not and shall not be construed as a covenant not
20 to sue any Settling Party as to any portion of Covered Matters
21 which such Settling Party has failed to perform as required by
22 this Consent Decree. This covenant not to sue does not apply to
23 any removal or remedial actions taken at the Site beyond those
24 actions required by the ROD, this Consent Decree or amendments
25 thereto.

1 B. Settling Parties hereby release and covenant not to sue
2 the EPA, including any and all officers, administrators, and rep-
3 resentatives thereof, for any claim, counter-claim, or cross-
4 claim asserted, or that could have been asserted prior to the ef-
5 fective date of this Consent Decree arising out of or relating to
6 the Covered Matters. This covenant does not apply to claims that
7 the Settling Parties may have against the USAF or against the
8 United States on behalf of the USAF. Moreover, nothing in this
9 Section shall be construed to limit the Settling Parties' ability
10 to initiate and prosecute an action pursuant to the Dispute
11 Resolution provisions of Section IX herein.

12 C. Settling Parties are not released from any matters not
13 expressly addressed by this Consent Decree, including the follow-
14 ing claims:

15 1. Claims based upon a failure by the Settling Parties
16 to meet the requirements of this Decree;

17 2. Claims of the EPA for costs or actions necessary at
18 the Tucson International Airport Area Superfund Site, except
19 those costs incurred or actions undertaken pursuant to the terms
20 of this Consent Decree;

21 3. Claims based on the Settling Parties' liability
22 arising from the past, present, or future disposal of hazardous
23 substances outside of the Tucson International Airport Area Su-
24 perfund Site;

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1 4. Claims for costs incurred by the EPA as a result of
2 the failure of the Settling Parties to meet the requirements of
3 Section V ("Obligations for the Remedial Action"), Section VI
4 ("Specific Obligations of the Settling Parties") and Section VII
5 ("Work to Be Performed") of this Consent Decree or the ROD;

6 5. Any claim or demand for damage to federal property
7 located any place that the Remedial Actions are being performed;

8 6. Claims based on criminal liability;

9 7. Claims based on liability for damage to natural
10 resources as defined in CERCLA;

11 8. Claims based on liability for hazardous substances
12 removed from the Tucson International Airport Area Superfund
13 Site;

14 9. Claims based on liability for future monitoring or
15 oversight expenses incurred by the EPA except as those expenses
16 are recoverable by the EPA pursuant to Section XIX herein
17 ("Reimbursement of Costs"); or

18 10. Liability for any violations of Federal or State law
19 which occur during implementation of the Remedial Action.

20 D. Notwithstanding any other provision of this Consent
21 Decree,

22 1. the EPA reserves the right to institute proceedings
23 in this action or in a new action or to issue an Order seeking to
24 compel the Settling Parties except MDC to perform any additional
25 response work at or emanating from the Site and
26
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1 2. the EPA reserves the right to institute proceedings
2 against the Settling Parties except MDC in this action or in a
3 new action seeking to reimburse the EPA for its costs for any
4 response action, hereafter undertaken under CERCLA, relating to
5 the Site if:

6 a. Prior to U.S. EPA certification of completion
7 of the Remedial Action concerning the Site,

8 i. conditions at the Site, previously unknown
9 to the EPA, are discovered after the entry
10 of this Consent Decree, or

11 ii. information is received, in whole or in
12 part, after the entry of this Consent
13 Decree,

14 and these previously unknown conditions or this
15 information indicates that the Remedial Action
16 is not protective of human health and the
17 environment; or

18 b. Subsequent to EPA certification of comple-
19 tion of the Remedial Action concerning the
20 Site,

21 i. conditions at the Site, previously unknown
22 to the EPA are discovered after the certi-
23 fication of completion by EPA, or

24 ii. information received, in whole or in part,
25 after the certification of completion by
26 EPA,

27 and these previously unknown conditions or this

1 information indicates that the Remedial Action
2 is not protective of human health and the en-
3 vironment.

4 3. The other Settling Parties covenant not to sue MDC
5 with respect to Covered Matters and with respect to any actions
6 they undertake, expenditures they incur, or obligations or
7 liabilities that arise either as a result of EPA's exercise of
8 its right to institute proceedings under this subsection or to
9 avoid the threat of such proceedings.

10 E. Except as necessary to address an imminent and substan-
11 tial endangerment to human health or the environment, EPA agrees
12 that prior to initiating civil proceedings to compel the Settling
13 Parties to perform additional response work pursuant to this Sec-
14 tion, it will initiate informal negotiations with the Settling
15 Parties. Any decision to terminate informal negotiations and in-
16 itiate proceedings rests solely within EPA's discretion and is
17 not subject to Dispute Resolution.

18 F. Nothing in this Consent Decree shall constitute or be
19 construed as a release, waiver, or a covenant not to sue regard-
20 ing any claim or cause of action against any person, firm, trust,
21 joint venture, partnership, corporation or other entity not a
22 signatory to this Consent Decree for any liability it may have
23 arising out of or relating to the Tucson International Airport
24 Area Superfund Site. Except as otherwise provided in this sec-
25 tion, nothing in this section shall be construed to limit the
26 right of a Settling Party to initiate and prosecute an action

27

1 against another Settling Party for breach of this Consent Decree
2 or to otherwise limit any right which any Settling Party has or
3 may have against another Settling Party.
4

5 XXV. CONTRIBUTION PROTECTION

6 Pursuant to Sections 113(f)(2) and 122(h)(4) of CERCLA and
7 other applicable federal and state law, Settling Parties and the
8 USAF shall not be liable to other persons or entities for con-
9 tribution claims regarding Covered Matters. Nothing in this Sec-
10 tion shall constitute or be construed as releasing or providing
11 any Covenant Not To Sue or Contribution Protection with respect
12 to Covered Matters to any person not a Settling Party or to any
13 Settling Party while in default on its obligations under this
14 Decree. The EPA expressly reserves the right to bring any ap-
15 propriate action against persons and entities not signatories
16 hereto.

17 Each Settling Party's and the USAF's right to Contribution
18 Protection under this Section shall remain in effect against all
19 other persons who are not Settling Parties while such Settling
20 Party or the USAF is not in default on any obligation under this
21 Decree, whether or not any other Settling Party has fully per-
22 formed its obligations under
23 this Decree.
24
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26
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1 XXV-A. THIRD PARTY CLAIMS

2 1. Intent of the Parties. Some or all of the Parties may
3 pursue claims regarding Covered Matters against third parties,
4 that is, persons or entities not Parties to this Consent Decree.
5 The third parties against whom such Parties assert such claims
6 may then assert claims for indemnification, cost reimbursement,
7 or contribution with respect to such claims against others of the
8 Parties, and such third-party claims may not be contribution
9 claims under CERCLA covered by the contribution protection
10 specified in Section XXV of this Decree. It is the desire of the
11 Parties, in consideration of their respective duties and obliga-
12 tions under this Consent Decree, to avoid the possibility of such
13 third-party claims inconsistent with the Final Settlement or
14 reallocation under this Decree by eliminating the possibility of
15 such third-party claims against any of the Parties (defined for
16 purposes of this Section as including the Settling Parties and
17 the USAF) regarding matters with respect to which such Parties
18 have already undertaken to discharge their responsibilities pur-
19 suant to this Decree.

20 2. Covenant Not to Sue for Portion of Claim. To eliminate
21 the possibility of the sort of third-party claims described in
22 subparagraph 1 of this Section, each of the Parties hereby
23 covenants that, with respect to any claim such Party may have
24 against any third party regarding Covered Matters, such Party
25 will refrain from suing such third party for a percentage of such
26 claims which is equal to the aggregate percentage of the total
27

1 payments made under this Consent Decree made by the other
2 Parties. Each of the Parties expressly reserves the right to sue
3 such third parties for the remaining percentage of such claims.

4 3. Satisfaction of Portion of Judgment. To further
5 eliminate the possibility of the sort of third-party claims
6 described in subparagraph 1 of this Section, each of the Parties
7 hereby also agrees that if it does sue a third party for any por-
8 tion of a claim which it has covenanted not to sue for under sub-
9 paragraph 2 of this Section, and if it subsequently obtains a
10 judgment as a result of such claim, then the portion of such
11 judgment which exceeds the amount permitted under subparagraph 2
12 shall automatically be deemed to be satisfied.

13
14 XXVI. CLAIMS AGAINST THE FUND

15 In consideration of the entry of this Consent Decree,
16 Settling Parties agree not to make any claims for Covered Matters
17 pursuant to Section 112 or Section 106(b)(2), of CERCLA, 42
18 U.S.C. §§9612, 9606(b)(2), or any other provision of law directly
19 or indirectly against the Hazardous Substance Superfund or make
20 other claims against the EPA for those costs expended pursuant to
21 this Consent Decree. In the event that EPA takes over a portion
22 or all of the remaining Remedial Action for reasons other than an
23 EPA determination of untimely or inadequate performance of a por-
24 tion or all of the Remedial Action by the Settling Parties and
25 Settling Parties are liable to reimburse their contractor for
26 standby or other costs that are incurred as a direct result of
27 EPA's action, Settling Parties reserve their right to make a

1 claim against the Fund and EPA reserves its right to oppose such
2 claim. Nothing in this Decree shall be deemed to constitute a
3 preauthorization of a CERCLA claim within the meaning of Sections
4 111 or 112 of CERCLA or 40 C.F.R. §300.25(d). The Settling
5 Parties shall not be reimbursed from the Fund or by a claim pur-
6 suant to this Section for any portion of the costs of remedial
7 actions that EPA performs based upon an EPA determination that
8 there has been untimely or inadequate performance of a portion or
9 all of the Remedial Action by the Settling Parties and
10 for which EPA seeks reimbursement from the Parties.

11

12 XXVII. COMMUNITY RELATIONS

13 Settling Parties shall cooperate with EPA and the State in
14 providing information to the public.

15

16 XXVIII. PUBLIC PARTICIPATION

17 Pursuant to the provisions of Section 122(d) of CERCLA, 42
18 U.S.C. §9622(d) and 28 C.F.R. §50.7, this Consent Decree will be
19 lodged with the Court for thirty (30) days to allow opportunity
20 for public comment.

21 No Party shall be bound by any modifications to this Decree
22 which affect its rights or obligations without its prior written
23 consent, and consent to this Decree is not consent to such
24 modifications.

25

26

27

1 XXIX. NOTICE TO THE STATE

2 EPA has notified the State of Arizona pursuant to the re-
3 quirements of CERCLA.

4
5 XXX. CONSISTENCY WITH THE NCP

6 The EPA and the Settling Parties agree that the Remedial Ac-
7 tion, if performed in accordance with the requirements of this
8 Consent Decree, is consistent with the provisions of the National
9 Contingency Plan, pursuant to Section 105 of CERCLA as amended 42
10 U.S.C. §9605, and that all costs reasonably incurred by the Set-
11 tling Parties in performing the Remedial Action are necessary
12 costs of response.

13
14 XXXI. INDEMNIFICATION

15 The City, the Tucson Airport Authority and Hughes shall in-
16 demnify the United States for seventy five percent (75%) of the
17 amount of any claim(s) arising from any injuries or damages to
18 persons or property resulting from any negligent, wanton or will-
19 ful acts or omissions of such Settling Party, its officers,
20 employees, agents, receivers, trustees, successors, assigns, Con-
21 tractors, subcontractors, or any other person acting on its be-
22 half in carrying out any activities pursuant to the terms of this
23 Consent Decree. For the purposes of any such indemnification,
24 any Contractors or subcontractors performing work pursuant to
25 this Consent Decree shall be deemed to be acting on behalf of all
26 of the City, the TAA, Hughes and USAF unless all the Settling
27 Parties other than MDC specify otherwise by written notification

1 to EPA. This indemnification shall not include an obligation to
2 defend the United States in any action relating to this Consent
3 Decree or Remedial Action.

4 The provisions of this Section shall not apply to claims
5 that the Settling Parties may have against the USAF or against
6 the United States on behalf of the USAF. Nor does this Section
7 create a duty of Settling Parties to indemnify USAF.

8

9 XXXII. CONTINUING JURISDICTION

10 The Court specifically retains jurisdiction over both the
11 subject matter of and the Parties to this action for the duration
12 of this Consent Decree for the purposes of issuing such further
13 orders or directions as may be necessary or appropriate to
14 construe, implement, enforce, terminate, or reinstate the terms
15 of this Consent Decree or for any further relief as the
16 interest of justice may require.

17

18 XXXIII. TERMINATION AND SATISFACTION

19 Upon completion of the Remedial Action, Settling Parties
20 shall submit to EPA a written certification that the Remedial Ac-
21 tion has been completed in accordance with this Decree. Settling
22 Parties shall demonstrate to EPA satisfaction in their written
23 certification that they have met the three requirements listed
24 and described below.

25

26

27

1 (1) Minimum Volume Extraction

2 Settling Parties shall extract and treat at least one pore
3 volume of water from that portion of the Site where concentra-
4 tions of VOCs in groundwater exceed the MCLs as of the effective
5 date of this Consent Decree.

6

7 (2) Aquifer Monitoring During System Operation

8 Commencing no sooner than with the final four consecutive
9 quarters of the time period necessary to satisfy the Minimum
10 Volume Extraction requirement, Settling Parties shall demonstrate
11 -- while the groundwater extraction and treatment system is
12 operating -- over four (4) consecutive quarters of groundwater
13 monitoring, that concentrations of volatile chemical contaminants
14 in the groundwater are at or below MCLs at each well for each
15 quarter.

16

17 (3) Aquifer Monitoring After System Shut-off

18 Upon satisfaction of the requirement for Aquifer Monitoring
19 During System Operation, Settling Parties may, after verbally
20 notifying the EPA Project Coordinator, cease extraction and
21 treatment of contaminated groundwater at the Site. Over the next
22 eight consecutive quarters (beginning with the quarter im-
23 mediately subsequent to the last of the four quarters of opera-
24 tion discussed in (2) above), Settling Parties shall demonstrate
25 through groundwater monitoring that concentrations of volatile
26 chemical contaminants in the aquifer are remaining below MCLs at
27 each well for each quarter.

1 Within sixty (60) calendar days of receipt of such cer-
2 tification, EPA shall approve or disapprove the certification.
3 Any disapproval shall be subject to Section IX (Dispute Resolu-
4 tion). The provisions of this Decree, other than Section XVII
5 ("Retention of Records") shall be deemed satisfied upon Settling
6 Parties' receipt of such written approval from EPA; provided that
7 termination of this Decree shall not alter the provisions of Sec-
8 tion XXIII ("Reservation of Rights"), Section XXIV ("Covenant Not
9 to Sue"), Section XXV ("Contribution Protection"), Section XXV-A
10 ("Third Party Claims"), Section XVIII ("Reimbursement of Costs"),
11 and Section XXVI ("Claims Against the Fund").

12 Notwithstanding anything in this Section to the contrary,
13 upon fulfillment of its obligation to make a payment in the
14 amount of \$500,000 into the Trust Fund pursuant to Section VI
15 ("Specific Obligations of the Settling Parties"), MDC shall be
16 deemed to have satisfied all of its responsibilities under this
17 Consent Decree and for Covered Matters and the Decree shall be
18 terminated as to such Settling Party; provided that termination
19 of this Decree as to MDC shall not alter the provisions of Sec-
20 tion XXIII ("Reservation of Rights"), Section XXIV ("Covenant Not
21 to Sue"), Section XXV ("Contribution Protection"), Section XXV-A
22 ("Third Party Claims") and Section XXVI ("Claims Against the
23 Fund").

25 XXXIV. SECTION HEADINGS

26 The section headings set forth in this Decree and its Table
27 of Contents are included for convenience of reference only and

1 shall be disregarded in the construction and interpretation of
2 any of the provisions of this Decree.

3

4

XXXV. ORDER DISMISSAL

5 Upon signature of Tucson Airport Authority, City of Tucson
6 Hughes Aircraft Company, and McDonnell Douglas Corporation, the
7 requirements to perform actions under EPA Order #89-03 issued on
8 January 24, 1989 to remedy contamination at the Site shall toll
9 until either the United States or the Court rejects this Consent
10 Decree. Upon the effective date of this Consent Decree, EPA
11 shall dismiss its Order and the Settling Parties shall be ab-
12 solved of any liabilities to EPA associated with that Order.

13

14

XXXVI. EFFECTIVE DATE

15 This Consent Decree is effective upon the date of its entry
16 by the Court.

17

18 SIGNED AND ENTERED this ___ day of _____, 1990.

19

20

21

22

23

UNITED STATES DISTRICT JUDGE

24

25

26

27

1
2 The undersigned agree to the foregoing Consent Decree and
3 agree that, upon filing of a motion for entry by the United
4 States, the Consent Decree may be entered.
5

6 UNITED STATES OF AMERICA
7

8 Dated: _____

By: _____

Richard B. Stewart
Assistant Attorney General
Land and Natural Resources Division
United States Department of Justice
Washington, D.C. 20530

12 STEPHEN M. McNAMEE
13 United States Attorney
District of Arizona

14 Dated: _____

By: _____

15 CINDY K. JORGENSEN
16 Assistant U.S. Attorney
17 Acapulco Building, Suite 310
110 S. Church Street
Tucson, AZ 85701

18 UNITED STATES ENVIRONMENTAL
19 PROTECTION AGENCY
20

21
22 Dated: _____

By: _____

23 DANIEL W. McGOVERN
24 Regional Administrator
25 U.S. Environmental Protection Agency
Region IX
215 Fremont Street
San Francisco CA 94105
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Dated: _____

By: _____
KATHLEEN H. JOHNSON
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region IX
215 Fremont Street
San Francisco CA 94105

TUCSON AIRPORT AUTHORITY

Dated: _____

By: _____
WALTER A. BURG
General Manager
Tucson Airport Authority
7005 S. Plumer Avenue
Tucson, AZ 85706

CITY OF TUCSON

Dated: _____

By: _____
THOMAS J. VOLGY
Mayor
City of Tucson
City Hall
P.O. Box 27210
Tucson, AZ 85726-7210

HUGHES AIRCRAFT COMPANY

Dated: _____

By: _____
EDWIN L. BIGGERS
Vice President
Hughes Aircraft Company
P.O. Box 11337
Tucson, AZ 85734

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MCDONNELL DOUGLAS CORPORATION

Dated: _____

By: _____
JOHN T. SANT
Senior Vice President and General Cou
McDonnell Douglas Corporation
P.O. Box 516
St. Louis, MO 63166

